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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BEECH AIRCRAFT CORPORATION,

Petitioner,

vs.

DORIS ELSWORTH, MILDRED BEST, SANDRA DUNAWAY, and JO ANN MIRO,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTIONS PRESENTED FOR REVIEW

1) Whether this Court's decision in *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615 (1984), was intended to permit lay juries to impose civil liability for violations of federal safety standards and regulations where the responsible federal regulatory agency has already determined that no regulatory violations occurred?

2) Whether the preemption doctrine precludes permitting a state court jury, pursuant to a negligence per se instruction, to find that an aircraft manufacturer violated federal regulations governing the certification of aircraft, when the Federal Aviation Administration promulgating those regulations and having exclusive jurisdiction over the subject matter of those regulations, had already expressly determined compliance with those regulations.

3) Whether a lay jury's reconsideration and redetermination of orders and decisions made by the Federal Aviation Administration in the aircraft certification process conflicts with or poses an obstacle to the uniform federal scheme of aircraft certification intended by Congress?

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner, BEECH AIRCRAFT CORPORATION, a Kansas corporation, prays that a writ of certiorari issue to review the judgment and opinion of the California Supreme Court.

Relying upon this Court's opinion in *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615 (1984), the California Supreme Court created a new, separate and independent ground of civil liability. For the first time anywhere in the country, a state supreme court has expressly allowed its trial juries to hold federally regulated industries civilly liable for violating federal safety standards *even though the responsible federal regulatory agency has already determined that no regulatory violations have occurred.* After the California opinion, local juries can direct-

ly interfere with federal regulatory decisions—here the licensing and certification of light aircraft—which Congress has exclusively relegated to the U.S. Government alone.

In affirming a plaintiff's verdict in an airplane crash case, the California Supreme Court has allowed the jury to go beyond common law negligence and strict liability standards, liberal though those standards are under California law. In addition, the California court has sanctioned a series of instructions on negligence per se, adding the separate cause of action for manufacturing an *illegally* certified aircraft. In so doing, the California Supreme Court has given no faith whatsoever to the fact that the Federal Aviation Administration ("FAA") has determined that the aircraft in question fully complied with all applicable federal regulations and can be legally flown anywhere in the United States. Moreover, the holding of the California Supreme Court directs state court juries to "police" activities subject to regulation by federal agencies, permits the jury to engage in the legislative function of determining whether a federal regulatory scheme is wise or effective, and opens the door for juries to enter any federal regulatory arena by redetermining federal regulatory decisions and basing liability thereon.

The California Supreme Court's Opinion vacated the Opinion of the California Court of Appeal which had held that under the preemption doctrine, the negligence per se instruction constituted an improper collateral attack on the expert certification determination of the FAA, the exclusive agency chosen by Congress to promulgate and enforce the Federal Aviation Regulations.

OPINIONS BELOW

The Opinion of the California Supreme Court appears at 37 Cal.3d 540 and 208 Cal. Rptr. 874 and is printed in the Appendix hereto. The Court of Appeal's Opinion is reported at 147 Cal. App. 3d 384 and 195 Cal. Rptr. 226 and is also printed in the Appendix.

JURISDICTION

The Opinion and judgment of the California Supreme Court was entered on December 17, 1984. A Petition for Rehearing was denied on January 16, 1984, and this Petition for Certiorari is timely filed within 90 days of that date as required by 28 U.S.C. §2101(c). The statutory provision granting jurisdiction to this Court is contained in 28 U.S.C. §1257 as follows:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

APPLICABLE CONSTITUTIONAL PROVISION

The constitutional provision applicable to this case is contained in Article VI, Clause 2 of the United States Constitution as follows:

> "This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATEMENT OF THE CASE

The Accident

On June 16, 1974, a twin engine Travel Air Model 95 aircraft, manufactured by Petitioner, crashed shortly after takeoff from Rialto, California Municipal Airport. At the time of the crash, the plane was being piloted by Edward Miro who was demonstrating the aircraft to three passengers, Richard Elsworth, Robert Best, and Nelson Dunaway, who were considering purchase of the aircraft from Miro's company, Miro Aviation, Inc.

The Contentions at Trial and the Negligence Per Se Instruction Based On Beech's Alleged Violation of Federal Law.

Wrongful death actions were filed on behalf of the passengers against the estate of the pilot, Miro Aviation, Inc., Beech, and Avco-Lycoming, the manufacturer of the plane's

engines. Miro's family also filed actions against Beech and Avco-Lycoming. These actions were consolidated for trial.

Before trial, Miro's insurer paid the passengers' heirs $100,000 each, the policy limits, to settle their claims against Miro's estate. The case then proceeded against Beech and Avco-Lycoming on behalf of all decedents. Avco obtained a defense verdict and the jury returned a general verdict against Beech.

The reason for the crash was hotly disputed. Petitioner contended that the crash was due to the negligence of Pilot Miro who deliberately turned off one of the engines and then negligently allowed the plane to reach stall speed from which he did not recover.[1]

Respondents' experts contended that due to a defective engine part manufactured by Avco-Lycoming one of the Travel Air's engines had to be shut down. While operating on one engine, the aircraft entered a stall, followed by a spin, causing the crash. Respondents alleged against Beech that the Travel Air had defective single engine characteristics, including its stall characteristics, and defective spin characteristics, including an "undue spinning tendency" while being operated on one engine. They also alleged that these single-engine and spin characteristics violated various federal aviation regulations.

Respondents asserted three legal theories of liability against Beech: (1) negligence and strict liability on the basis of the aircraft's design; (2) negligent failure to warn pilots of the aircraft's alleged "undue spinning tendencies"; and (3) negligence per se on the basis of the al-

[1] A "stall" occurs when the wing loses its "lift" due to the reduced air flow over the top of the wing's surface. This loss of lift is usually caused by inadequate airspeed or an excessive angle of attack of the wing in relation to the airflow. In this context, "stall" has nothing to do with operation of the engine.

leged violation of five federal aviation regulations governing the certification of this aircraft.

The trial court instructed the jury in the basic elements of proof required under California law for the first two theories. As an independent grounds for liability, however, the trial court, over Beech's strenuous objections, also gave a negligence per se instruction which forms the crux of this Petition and which provided as follows:

> "If you find that a party to this action violated the Civil Air Regulations just read to you and that such violation was a proximate cause of injury to another, you will find that such violation was negligence unless such a party proves by a preponderance of the evidence that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law."

Beech urged that the giving of this instruction violated the preemption doctrine and was an improper collateral attack on a certification decision of the United States agency (FAA) charged with promulgating and enforcing federal regulations governing all civil aircraft.

Beech did not complain about Respondents' assertion of the first two theories which were proper under California law. And, as long as trial is limited to the issues properly raised by those theories, Beech would concede Respondents' right to test Beech's liability for this accident. However, Beech did complain then and does complain now about the negligence per se instruction, which allowed the jury to find Beech liable for violating regulations when the FAA had already expressly determined compliance. It also required Beech to defend not only the certification decision for this aircraft, but aircraft manufactured by others and the wisdom and efficacy of the entire federal certification process.

The Travel Air Certification

The Travel Air involved in this accident was manufactured in 1958. The FAA originally certified the Travel Air Model 95 in 1957. At the time of certification, the FAA officials in charge interpreted the Civil Air Regulations (CARs) as not requiring spin testing for twin-engine aircraft. In 1958 following a Travel Air crash involving the son of U.S. Senator McClellan the Washington office of the FAA directed that the Travel Air be spin tested in accordance with CAR Part 3.

These tests were conducted on August 8, 1958. At that time, the Travel Air was spin tested by a Beech test pilot and John Hurley, an FAA flight test pilot, with Ike Hoover, a representative of the Civil Aeronautics Board, present as well. Hurley was in the cockpit the entire time while the tests were performed. At their conclusion, he prepared a written report (printed in the Appendix hereto) for submission to his supervisor who reviewed and signed it.

Hurley's report, admitted as an exhibit at trial, showed that the Travel Air satisfied all the spin testing requirements contained in CAR §§3.123 and 3.124(a). In particular, the report found that the aircraft did not possess any "undue spinning tendency" and that it had "exceptionally good single-engine stall characteristics." Hurley recommended that the Travel Air be certified.

The FAA formally found that the Travel Air fully complied with CAR §§3.123 and 3.124 and that the Travel Air's FAA Certification would continue in effect. The FAA advised Beech of its determination.

This certification decision has never been challenged under the FAA review provisions permitting any person—including consumer advocates, private citizens, accident

victims or personal injury plaintiffs—to challenge the certification of any aircraft by filing a written complaint with the FAA. See 49 U.S.C. §1482(a); 14 C.F.R. §§13.1 *et seq.*

Nevertheless, by means of the negligence per se instruction, Respondents were permitted in this case to have the lay jury redetermine the FAA's decision and, if the jury disagreed with the FAA, it then had the power to find Beech liable as a federal lawbreaker. This carte blanche given to the jury to second-guess the FAA's expert determination and to redecide the certification was the thrust of Respondents' entire case.

Proceedings in the Trial Court

The record in the trial court shows that Respondents did not focus on the issues appropriate to their claims. Rather, their case focused on whether the certification of the Travel Air was legal, whether the FAA abdicates its responsibility in aircraft certification and on the effectiveness of the regulatory scheme adopted by Congress for the certification of aircraft.

In essence, Respondents alleged that the certification of the aircraft was illegal and, despite the fact of type certification and the FAA's express finding that the Travel Air complied with the certification regulations, the aircraft *violated* those regulations. More than representing a theory of liability, the attack on the conduct of the FAA and Beech in the certification process and the decision to issue a type certificate under the guise of negligence per se was the centerpiece of Respondents' claims against Beech. Indeed, the entire theme of Respondents' case was the alleged illegal conduct of Beech and the FAA in certifying this aircraft. Negligence per se was merely the vehicle for transforming this case into an open attack on the wisdom and efficacy of the certification process and

the federal government's decision to certificate the Travel Air and other aircraft.

Respondents were permitted to offer evidence on the certification of the DC-10 and the Cessna Conquest and whether the FAA was totally incompetent. Having undermined the regulatory scheme adopted by Congress, Respondents introduced evidence purporting to show that the Travel Air violated the certification regulations and that the issuance of a type certificate was illegal.

These attacks on the certification process in general and the certification of the Travel Air in particular were culminated by Respondents' closing argument. After urging that the CARs are a standard for determining whether an aircraft is safe, counsel argued that the Travel Air failed to comply:

> "[T]his airplane is uncertifiable. It was uncertifiable then and it is uncertifiable now.
>
> [T]his airplane could not have legally been built then; it couldn't legally have been built now. . . ."

Respondents then turned their attention to the FAA and the wisdon of the certification process:

> "But what about the FAA? What about the CAA, the people charged by the Congress of the United States to protect us from manufacturing errors and mistakes and from bad airplanes? What about the CAA? They approved this thing.
>
> Well, that may have sounded good before we started but I hope it doesn't sound good anymore, because the people in whom the people of the United States through the Congress of the United States have placed their trust don't do their job."

Rebuttal argument was unrelenting in its criticism of the FAA's lack of integrity:

> "[M]ost of us have faith in the ability of our government, maybe a sense of patriotism or whatever it is, but when we pick up something in the meat market that says United States Department of Agriculture, Grade, Choice, on the meat, you believe that some guy from the agriculture department that knows something about beef has looked at your meat and found it to be safe for human consumption.
>
> I think logically you can make the same assumption without knowing what you know now, that if the Federal Aviation Administration puts their imprint on a document or an airplane or a product, it has got to be pretty good.
>
> I think we all know that that doesn't follow anymore. . . ."

Thereafter, despite the FAA's certification of the aircraft and determination that Beech was in compliance with all applicable federal regulations, the jury was read the five civil air regulations allegedly violated and charged with the negligence per se instruction. After two weeks of deliberation, the jury returned its verdict against Beech.

Court of Appeal's Opinion

On appeal to the California Court of Appeals, the judgment in favor of Respondents was reversed and a new trial ordered. The Court of Appeal held that the negligence per se instruction permitting the lay jury to overrule the certification decision of the FAA was an improper collateral attack on a decision of the FAA which had exclusive power and jurisdiction to enforce its own regulations. In the language of the Court of Appeal:

> "Congress has committed the determination of whether a particular design meets legitimate safety standards to an agency, the FAA, with expertise in that area. That procedure is denominated certification. The statutes governing the FAA provide a remedy against

improper certification by way of a direct challenge in the Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia. That certification may not be attacked in state courts. If an airplane is manufactured according to the certificate, a state court may not, as this trial court did, instruct a jury to *presume* Beech negligent if it found that the certification did not meet the FAA standards relating to this model of plane. Negligence per se cannot be used to impose liability for the crash herein involved. In permitting such collateral attack on the certificate of the Travel Air Model 95, the trial court committed reversible error."

California Supreme Court Opinion

The California Supreme Court vacated the Court of Appeal's Opinion and affirmed the jury's verdict, thereby approving the giving of the negligence per se instruction by which the jury was permitted to second-guess the FAA's decision to certify the aircraft and to hold Beech liable as a violator of federal law.

Citing this Court's recent decision in *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615 (1984) the California Supreme Court noted that actions for civil damages are not necessarily inconsistent or inappropriate in cases where the defendant may have adhered to all the federal regulations governing its conduct. *Silkwood*, however, involved no negligence per se instruction and did not permit the jury to redetermine a federal agency's decision and certification of compliance with its own regulations, much less have that redetermination afford the basis for Kerr-McGee's liability.

Nevertheless, in the instant case the California Supreme Court held that permitting the jury to redetermine and overrule the FAA's certification decision would "assist the

FAA in policing a manufacturer's compliance" with the regulations and serve to find violations that may not have come to the attention of the FAA. However, the inconsistency of the Court's "policing" rationale was made apparent by the court's own further observation that, despite the instruction permitting the jury to overrule the FAA and decide that the Beech Travel Air Model 95 was not properly certified, Respondents did not seek to "revoke" the aircraft's certificate.

Beech now seeks this Court's review of this unprecedented, potentially far-reaching decision which undermines the federal government's exclusive role in aviation regulation and subjects aircraft manufacturers to conflicting decisions by lay juries who are permitted to second-guess the FAA's certification process and determination.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I.

THE FAA HAS EXCLUSIVE AND PLENARY AUTHORITY OVER THE SUBJECT OF AIRCRAFT CERTIFICATION. THE CALIFORNIA SUPREME COURT ERRED IN HOLDING THAT A JURY COULD HOLD BEECH LIABLE AS A VIOLATOR OF THE FAA'S CERTIFICATION REGULATIONS WHEN THE FAA HAD ALREADY FOUND BEECH TO BE IN COMPLIANCE WITH THE REGULATIONS.

A. Legislative History

Since the Civil Aeronautics Act of 1938, Congress has vested with the CAA, and now the FAA, exclusive administration of the regulation of aircraft safety design stand-

ards, including the uniform certification of aircraft. *Rosenhan v. United States*, 131 F.2d 932 (10th Cir. 1942), *cert. denied*, 318 U.S. 790 (1943). The FAA was established by the Federal Aviation Act of 1958, 49 U.S.C. §1301, *et seq.*, which defines the authority and responsibilities of the FAA. The legislative history to the Act makes clear that the FAA would have "plenary authority to . . . [m]ake and enforce safety regulations governing the design and operation of civil aircraft." House Report No. 2360, 85th Congress, 2d Session, p. 2 (1958). The Act was also designed to give the FAA "full responsibility and authority for . . . the promulgation and enforcement of safety regulations . . . ." Senate Report No. 1811, 85th Congress, 2d Session, p. 1 (1958). This report emphasizes the need for a unified system of safety regulation which would be administered by the agency with expertise in this area. "Thus, the Federal Government bears virtually complete responsibility for the promotion and supervision of this industry in the public interest." *Id.* at p. 5.

Consistent with the legislative history of the Federal Aviation Act, 49 U.S.C. §1421 specifically empowers and directs the Administrator of the Federal Aviation Administration:

> "to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:
>
> (1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety . . . ."

Pursuant to this Congressional authority, the Administrator has enacted regulations setting forth minimum safety standards for small aircraft such as the Beech Travel

Air, 14 C.F.R. Parts 21 and 23.[2] "If the Administrator finds that [an] aircraft . . . meets the minimum standards, rules and regulations prescribed by the Administrator, he shall issue a type certificate therefor." 49 U.S.C. §1423(a)(2). The FAA also has the power to amend, modify, suspend or revoke a type certificate. 49 U.S.C. §1429(a). The FAA is authorized to make inspections and tests, including flight tests, necessary to determine compliance with the applicable regulations. 14 C.F.R. §21.33. Once compliance is found and the type certificate issued, it "is effective until surrendered, suspended, revoked, or a termination date is otherwise established by the Administrator." 14 C.F.R. §21.51. These FAA regulations have the force and effect of law. *United States v. Schultetus*, 277 F.2d 322, 327 (5th Cir.), *cert. denied*, 364 U.S. 828 (1960).

In sum, the federal government, acting through the FAA, has completely occupied the field of aircraft certification.

B. The California Supreme Court's Opinion Allowing Lay Juries To "Police" And Overturn The FAA's Certification Decisions Is Patently Violative Of The Preemption Doctrine.

By approving the negligence per se instruction empowering the jury to re-examine and overrule the FAA's certification of the Beech Travel Air, the California Supreme Court has wholly undermined the exclusive power granted by Congress to the FAA to promulgate, interpret and enforce the Federal Aviation Regulations applicable to this case. Such a result could not be more

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[2] The actual regulations at issue in this case are found in the Civil Aeronautics Regulations §§3.85(b), 3.106, 3.120, 3.123 and 3.124 and are reproduced in the Appendix to this Petition, Appx. pp. 46a-48a.

directly prohibited by the pre-emption doctrine. As stated in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 285-286 (1970):

> The constitutional principles of preemption, in whatever particular field of law they operate, are designed with a common end in view: *to avoid conflicting regulation of conduct by various official bodies which might have some authority over the subject matter.* (Emphasis added.)

The result of this case is even more at odds with these constitutional preemption principles. Here Beech is subject to "conflicting regulation of its conduct"—once by the official body (FAA) that has exclusive authority over the regulations for and certification of aircraft, and again by 12 lay persons with no expertise in aviation, but who are now empowered to second-guess the FAA's decisions and to "police" its activities.

In short, the California Supreme Court has "deputized" all California lay juries to be assistant FAA inspectors expert in airplane certification and has empowered them to reexamine all prior FAA certification decisions. The irony, of course, is that plaintiffs embrace and rely on the Federal Aviation Regulations promulgated by the FAA as the basis for their negligence per se claim in the first instance, while at the same time they ignore and discard the FAA's interpretation and enforcement of those same regulations as applied to the very aircraft at issue.

In a different but related context, this Court recently stated: "Judicial intervention in [the FAA's] decision-making through private tort suits would require the courts to 'second-guess' the political, social and economic judgments of an agency exercising its regulatory function." *United States v. S.A. Empresa de Viacao Aerea Rico Grandense*, ____ U.S. ____, 104 S.Ct. 2755, 2768 (1984). Yet, this is exactly what the negligence per se instruc-

tion permitted the jury to do in this case. In fact, the California jury went further: it *reconsidered* certification decisions and orders made by the FAA to determine a violation occurred when the FAA had expressly found compliance.

II.

THE *SILKWOOD* DECISION DOES NOT SUPPORT THE CALIFORNIA SUPREME COURT'S DECISION IN THIS CASE.

The California Supreme Court cited and relied upon this Court's majority opinion in *Silkwood v. Kerr-McGee Corp.*, ___ U.S. ___, 104 S.Ct. 615 (1984):

> "In *Silkwood* the federal government had enacted regulations concerning the safety of nuclear power plants and the licensing of such plants. These regulations occupied the field of safety to the exclusion of state enactments on the subject. Nevertheless, the high court ruled that common law tort principles of Oklahoma law were applicable to hold the defendant employer liable to an employee for compensatory and punitive damages as the result of radiation at the defendant's plant. After a close analysis of the legislative background of federal laws relating to nuclear power, the court concluded that Congress had assumed persons injured by nuclear accidents were free to utilize state court remedies, and that 'traditional principles of state tort law would apply with full force unless they were expressly supplanted.' (*Id.* at p. ..... [104 S.Ct. at p. 625])"

The California Supreme Court's reliance on *Silkwood* is wholly misplaced. Unlike Kerr-McGee in *Silkwood*, Beech in no way contests Respondents' right to "utilize state court remedies" and to seek recovery against Beech under "traditional principles" of negligence and strict liability in tort.

Rather, Beech contests only Respondents' right to have the jury instructed with a negligence per se instruction whereby it was permitted to redetermine the FAA's certification of the aircraft, second-guess and overrule the FAA's expert decision, and hold Beech liable as a violator of federal law. No such right was recognized in *Silkwood*. *Silkwood* involved no negligence per se instruction. The *Silkwood* jury was not called upon to redetermine any order or decision of the NRC. The *Silkwood* majority did not permit punitive or compensatory damages to be based on a jury finding that *Kerr-McGee* should never have been allowed to enter the nuclear field, or that the NRC erred in licensing its plant, or that the federal regulatory scheme was inadequate. Yet this is how the California Supreme Court reads *Silkwood* and what it is inviting juries to do with any regulatory scheme adopted by Congress.

The decision of the California Supreme Court is thus based on a misinterpretation and unintended *expansion* of *Silkwood*: as long as the cause of action does not conflict with the federal scheme, in deciding that cause of action the jury is free to reexamine federal regulatory decisions and in fact reach contrary conclusions. *Silkwood* does not support this unprecedented conclusion which undercuts the entire concept of preemption.

The issue is *not* whether a wrongful death action for compensatory damage is in conflict with the FAA's certification process and decisions. The issue is whether a jury can invade the province of the FAA, or any other regulatory agency, and make determinations exclusively within the FAA's authority. *Silkwood*'s deference to state court civil suits does not and could not go that far. Such "deference" is an invitation to consume the entire regulatory scheme. There is almost no federal issue or decision

which would not be subject to reconsideration under the California Supreme Court's reasoning.

The preemption analysis of the California Supreme Court is not unlike that of the Iowa Court of Appeals which was reversed in *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311 (1981). There the plaintiff's claims arose from an "abandonment" by the rail carrier which had obtained a certificate from the ICC permitting the abandonment. After noting that the ICC's authority over the subject was plenary and exclusive, this Court held that when the facts underlying the particular claim had already been determined by the ICC, they could not be relitigated. *Id.* at 327, 331.

This situation is no different in the instant case. In order for Respondents to have prevailed on a negligence per se theory, they had to convince the jury that the certification regulations in question had been violated. However, by issuing the type certificate, the FAA had already determined compliance. *The FAA actually participated in the certification testing and found that the aircraft met the requirements contained in the regulations.*

The California Supreme Court's expansion of the *Silkwood* holding to the facts at bar is thus wholly erroneous and the *Silkwood* holding urgently needs clarification within the parameters of the preemption doctrine.

A. The Holding Of The California Supreme Court Undermines The Uniform Application Of Any Regulatory Scheme And Sanctions Proceedings Which Are In Conflict With And Pose An Obstacle To The Federal Scheme Of Aircraft Certification.

As demonstrated by the record at trial, the negligence per se instruction opened the door for Respondents to question and attack the Congressional scheme and its im-

plementation by a federal agency. Respondents invited, the negligence per se instruction required, and the California Supreme Court authorized, the jury to wear the hat of a legislature, regulatory agency, policeman and jury. In so doing, they have undermined the entire concept of regulatory agencies and exclusive federal control over the areas entrusted to those agencies.

To support its unprecedented and potentially far-reaching[3] approval of a negligence per se instruction permitting the jury to "police" and redetermine the FAA's certification decisions, the California Supreme Court concluded that its holding would enhance air safety and "assist" the FAA in this goal. What the California Supreme Court failed to recognize is that the FAA has already expressly determined compliance with the regulations in question. There is simply nothing left to police.

Nor will the FAA, airplane manufacturers or the public be assisted or benefited by the California Supreme Court's decision. How can a system of aviation safety regulation entrusted to the federal agency with demonstrated aviation expertise be strengthened by permitting nonuniform and conflicting decisions by lay juries? It cannot. This is particularly true where, as here, the regulations in question involve largely subjective criteria calling for an exercise of judgment and application of expertise.

The California Supreme Court's attempted justification for its holding also reveals an inconsistency in the court's "logic." The jury is cast in the role as a policeman to determine compliance yet the Court states that the air-

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[3] A majority of the states have a negligence per se doctrine for the violation of statutes, ordinances or regulations having the force and effect of law. Prosser & Keeton, Law of Torts, §36, pp. 230-231 (5th ed. 1984).

craft's certification is not affected thereby. But if the FAA's "policeman" determines a violation then what is an aircraft manufacturer supposed to do? Must Beech ground the entire Travel Air fleet? Must Beech submit this aircraft for recertification, despite the FAA's expressed determination that it met applicable regulations?

Nor can such inconsistent determinations by juries possibly enhance air safety. Certainly, no one can or should feel confident about a jury of non-experts without experience or basis for their decision, except the testimony of experts retained by Respondents for this case, second-guessing and "policing" the highly technical aviation safety decisions of the expert federal agency which Congress has entrusted and empowered to make such decisions.

This raises a more fundamental concern. How can any system of regulation entrusted to the agency with expertise be strengthened by permitting nonuniform and conflicting decisions by lay juries? The answer is obvious. The very concept of a jury's *de novo* determination of compliance flies in the face of the Congressional policy regarding regulation of aircraft, or the uniform regulation of any other industry of activity.

Certainly, the California Supreme Court Opinion does not suggest that its rationale is limited to the aviation context. In fact, the court's rationale demonstrates a virtually unlimited scope of regulatory functions and decisions which can now be scrutinized by a lay jury. If there is an injury resulting from operation of a nuclear power plant, the jury can consider whether the NRC properly did its job in licensing that facility and hold the utility liable if it concludes the NRC was wrong. Or, if a plaintiff alleges that a drug should not have been marketed

because it is dangerous, the jury can reweigh all the elaborate tests and evaluations performed by the FDA in allowing the drug to be marketed. Manufacturers, and others subject to regulation, should not be required to defend the government and its decision in any jurisdiction where they are challenged by plaintiffs.

And what if the jury disagrees with those decisions? Must the utility redesign its nuclear power plant or revise its operating procedures? Must the drug manufacturer withdraw its product from the market? If it doesn't, will it possibly be subjected to damages because it is marketing an "illegal" product? These questions raised by the California Supreme Court demonstrate the confusion and havoc which will be visited upon federal regulatory schemes and the industries or activities which they regulate.

Finally, in the face of the trial court record, it is impossible to conclude that anything which occurred there "enhanced" the Congressionally adopted scheme of aircraft certification. Rather than uphold or "strengthen" that scheme, Respondents ridiculed it, challenged its wisdom and impugned its implementation. Having been made a policeman, it now becomes the duty of the jury to investigate a plaintiff's attacks on an agency's procedures and decisions. And, whether it is the FAA or another agency, plaintiffs who are unhappy with an agency's determination can be expected to criticize or denigrate that determination at every turn, all in the name of "policing." By its unprecedented action, the California Supreme Court has suddenly made such attacks on an agency relevant to the outcome of the case before the jury.

III.

THE CALIFORNIA SUPREME COURT'S DECISION CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT AND OTHER COURTS OF REVIEW HOLDING THAT THE DECISIONS AND ORDERS OF A FEDERAL REGULATORY AGENCY ARE NOT SUBJECT TO COLLATERAL ATTACK.

The California Supreme Court's decision, permitting the jury to reconsider and redetermine the certification decision, is in clear conflict with decisions of this Court and other courts of review prohibiting such a collateral attack on administrative orders and determinations of federal regulatory agencies. *Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 324 n. 11 (1981); *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 421-422 (1965); *Gaunce v. de Vincentis*, 708 F.2d 1290, 1292-1293 (7th Cir.), *cert. denied*, 104 S.Ct. 417 (1983); *Campos v. Puerto Rico Sun Oil Co.*, 536 F.2d 970, 974 (1st Cir. 1976); *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953); *O'Donnell v. Bond*, 510 F. Supp. 925, 928 (D.D.C. 1981).

In *Interstate Natural Gas*, plaintiff gas company filed a complaint against another gas company which owned the pipeline, claiming that defendant's pipeline rates filed with and approved by the Federal Power Commission were unreasonable. In affirming dismissal of plaintiff's claims, the Court of Appeals held:

> "Appellant's alleged cause of action based on the refusal of Appellee to transport its gas is, in effect, a collateral attack upon an order of the Commission. * * * Appellant cannot, by means of this suit for damages, indirectly annul the action taken by the Commission."

209 F.2d at 385.

Moreover, where as here Congress has provided a statutory procedure for review of an administrative order, 49 U.S.C. §1486(a), such review is exclusive. As explained by the Court in *Gaunce v. de Vincentis, supra,* holding that the district court had no jurisdiction to review the FAA's revocation of plaintiff's airman's certificate, the Federal Aviation Act provides for giving deference to the FAA's expertise in an area "outside the conventional experience of judges," and the statutory scheme established by Congress makes it clear that orders and decisions of the FAA are "not subject to collateral attack." 708 F.2d at 1293. How much more applicable is this rationale to the collateral attack by a non-expert jury permitted by the negligence per se instruction in the case at bar.

In *Campos v. Puerto Rico Sun Oil Co., supra,* a case with remarkably similar facts, the United States Coast Guard, after testing a pilot's qualifications, issued a certificate authorizing pilotage across particular navigable waters. Plaintiff brought an action for damages alleging, in part, that the pilot could not legally operate in those waters because his certificate was invalid. The First Circuit held that such collateral challenge to the license was not permitted. 536 F.2d at 974. Under the California Supreme Court's reasoning, not only could the District Court question the certificate issued by the Coast Guard, the District Court *should* have second-guessed the Coast Guard's basis for and decision to issue the license in order to properly "police" regulation of activities on navigable waters.

O'Donnell v. Bond, supra, is also contrary to the California Supreme Court's rationale. Plaintiffs there challenged the certification basis and procedures adopted by the FAA for certification of the McDonnell Douglas Super 80 Aircraft. Plaintiffs argued that the FAA's issuance of

a type certificate for this aircraft was "defective and unlawful." In dismissing the suit for lack of subject matter jurisdiction, the District Court first held that the FAA's decision to issue a type certificate is a final order subject only to the exclusive review procedures mandated by 49 U.S.C. §1486(a). As such,

> " 'Review in the Court of Appeals is *exclusive*, absent extraordinary circumstances, *preempting the jurisdiction of state courts* as well as federal district court.' "

510 F. Supp. at 928 (emphasis added).

As evident from these cases, the wisdom of precluding collateral attack on administrative decisions is apparent if the administrative scheme is to be effective. Such conclusion is compelled where as here Congress has established a statutory procedure of judicial review of agency decisions, and the subject is as important and complex as the uniform regulation of aviation and air safety throughout the country.

CONCLUSION

To correct a blatant violation of the preemption doctrine which undermines the entire Congressional scheme for the federal regulation of aviation, and which misinterprets this Court's decision in *Silkwood,* and which conflicts with numerous prior preemption decisions of this Court and other courts of review, and which will detract from, not enhance, the goal of uniform aviation regulation and air safety, Petitioner Beech Aircraft Corporation respectfully requests that a Writ of Certiorari issue to review the judgment and Opinion of the California Supreme Court.

Respectfully submitted,

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APPENDIX

IN THE
SUPREME COURT OF THE STATE OF CALIFORNIA

[Filed December 17, 1984]

DORIS ELSWORTH et al.,

Plaintiffs and Respondents,

v.

BEECH AIRCRAFT CORPORATION,

Defendant and Appellant.

L.A. 31838
Super. Ct. No. C 126505

Section 699 of the Evidence Code sets forth the doctrine commonly called negligence per se. It provides that negligence of a person is presumed if he violated a statute or regulation of a public entity, if the injury resulted from an occurrence that the regulation was designed to prevent, and if the person injured was within the class for whose protection the regulation was adopted. This presumption may be rebutted by proof that the violator did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.[1]

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[1] Section 669 of the Evidence Code provides in relevant part:
"(a) The failure of a person to exercise due care is presumed if:
"(1) He violated a statute, ordinance, or regulation of a public entity;

(Footnote continued on following page)

The primary issue in this case is whether the doctrine may be applied to hold liable for defective design the manufacturer of an aircraft that allegedly violated safety standards promulgated by the Federal Aviation Agency (FAA), even though the agency had issued to the manufacturer a certificate declaring that the design of the airplane met all applicable safety standards.[2]

In 1974 Edward O. Miro, an experienced pilot, took three prospective buyers on a demonstration flight in a Travel Air twin engine airplane manufactured by defendant Beech Aircraft Corporation (Beech). It was daylight, the weather was clear, and the winds were light. After takeoff, the airplane reached an altitude of 800 feet, made two right turns into the traffic pattern, then suddenly turned left out of the traffic pattern, fell over, and went into a spin. It recovered briefly, but fell again into a final flat spin and crashed seven minutes after takeoff. All aboard were killed.

When the Travel Air was found after the crash, it was discovered that Miro had turned off the left fuel selector, shut down the left engine, and feathered (i.e., streamlined in the direction of flight) the left propeller blades. The landing gear was in the "down" position, and the wing flaps were partially or all the way down. A thermostatic valve in the left engine was broken.

The wives and children of the three passengers filed wrongful death actions against Beech and Miro, and Miro's heirs cross-complained against Beech.[3] Miro's insurer settled with the heirs of the passengers, and the trial proceeded against Beech. The heirs of the passengers and of Miro (hereafter plaintiffs) sought recovery on several theories, including negligence per se, alleging that the Travel Air did not comply with various safety regulations adopted by the FAA.[4]

At the trial, plaintiffs claimed that the crash was caused by the stall of the airplane with the left engine feathered, and an inadequate stall warning system. According to expert testimony produced by plaintiffs, the stall resulted in a nonrecoverable flat spin caused by the undue spinning tendency of the airplane. Plaintiffs' witness surmised that Miro had feathered the left engine propeller because a valve in the left engine had failed, causing the instrument that measured oil to show a low operating pressure. In these circumstances, the propeller had to be feathered quickly to prevent the engine from coming apart, and to avoid a fire.

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[1] *continued*

"(2) The violation proximately caused death or injury to person or property;

"(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

"(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

"(b) This presumption may be rebutted by proof that:

"(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; . . . ."

[2] The FAA is the successor agency of the Civil Aeronautics Board under the Federal Aviation Act of 1958. (49 U.S.C. § 1301 et seq.) For simplicity, all references herein to the agency will be to the FAA, even if the reference deals with conduct prior to 1958.

[3] Suit was also filed against Avco-Lycoming, the manufacturer of the Travel Air's engine, on a strict liability theory, claiming a defect in the oil cover bypass valve. The jury found in favor of Avco-Lycoming.

[4] Other theories of recovery advanced by plaintiffs were Beech's negligence and strict liability for design defects in the Travel Air, strict liability for Beech's failure to meet FAA safety standards for single engine stalls, single engine climb rate, and spin characteristics, and negligence for Beech's failure to adequately warn pilots of the Travel Air's "undue spinning tendencies" during single engine stalls.

A test pilot who tested a Travel Air in preparation for the trial testified on behalf of plaintiffs that, with only one engine operating, the stall characteristics of the Travel Air were dangerous because of an undue tendency of the airplane to spin. He testified also that the stall warning light was inadequate. It was his opinion that the Travel Air failed to comply with five specified safety regulations of the FAA.

Beech attributed the crash to pilot error. Its witnesses testified that Miro had failed to maintain sufficient speed to prevent the airplane from entering into a nonrecoverable stall.

The FAA had certified the design of the Travel Air as complying with all applicable safety regulations. The aircraft first received a type certificate in 1957, after Beech employees conducted various inspections and tests and submitted to the FAA details regarding the construction and design of the airplane. Beech did not conduct tests for the spinning characteristics of the Travel Air because Harold Hermes, then the regional chief of the FAA's flight test branch, interpreted the safety regulations as not requiring spin testing for twin engine aircraft. In 1958 a Travel Air crashed, and the Washington headquarters of the FAA ordered that the aircraft be tested for its spinning characteristics. The spin testing was performed by a Beech employee, accompanied by a FAA test pilot. Following the test, FAA officials, including the test pilot, recommended that the certification for the Travel Air be continued, finding that it complied with all applicable safety regulations. This recommendation was accepted by the agency.

At the conclusion of a four-month trial, the court read to the jury five FAA safety regulations that plaintiffs alleged Travel Air failed to meet, and instructed that the jury must find Beech negligent if they found that the regulations were violated and that the violations proximately caused decedents' injuries, unless Beech justified its failure to comply. (BAJI No. 3.45 (6th ed. 1977).) After

two weeks of deliberations, the jury returned a general verdict against Beech; two jurors voted in Beech's favor.

On this appeal from the ensuing judgment Beech claims that the court erred in instructing the jury on the doctrine of negligence per se, in admitting various items of evidence, and in refusing to grant Beech's motion for a new trial because of alleged jury misconduct.

Beech does not challenge the sufficiency of the evidence to support the verdict on any of the theories of recovery advanced by plaintiffs. Nor does it assert that the jury should have been prohibited from giving any consideration to the question of Beech's compliance with the FAA safety regulations. It concedes that satisfaction of the FAA standards would not constitute a complete defense and the jury could have found Beech liable for defective design of the Travel Air even if it had complied with the FAA regulations, because the jury could have determined that such compliance was insufficient to absolve Beech's duty as a manufacturer. (See Wilson v. Piper Aircraft Corp. (Ore. 1978) 577 P.2d 1322.)

Rather, Beech's claim is that the jury should have been compelled to give determinative effect to the FAA decision that the Travel Air complied with all applicable safety regulations, and that it was error to give the negligence per se instruction to the effect that Beech was guilty of negligence if the Travel Air did not meet the regulations. Beech urges that the effect of the instruction was to allow the jury to second-guess the FAA decision that the Travel Air complied with the regulations, thereby intruding into a field preempted by federal law.

The FAA is required by the Federal Aviation Act of 1958 to adopt minimum standards governing the design, construction and performance of aircraft. (49 U.S.C. § 1421 (a)(1).) It has issued detailed regulations setting forth safety standards and the requirements that must be met by an airplane as to both design and testing before a type certificate may be issued. (14 C.F.R. § 21.1 et seq. (1984).) The act authorizes the agency to delegate to any proper-

ly qualified person the examination, inspection and testing necessary to the issuance of a certificate. (49 U.S.C. § 1355 (a)). Pursuant to that authorization the agency has permitted manufacturers to perform the tests necessary to assure that the regulations are met, and that the aircraft complies with all certification requirements. (14 C.F.R. §§ 21.21, 21.35.)

An experienced manufacturer with employees qualified in the various aspects of airplane design may qualify for the "delegation option" program, which allows the manufacturer's employees to act on behalf of the FAA to assure that all the appropriate tests and inspections for certification are performed. This procedure avoids the necessity for FAA personnel to repeat the tests and inspections required for certification. The manufacturer notifies the FAA whether the aircraft complies with safety regulations. The function of the FAA is largely to police compliance with the regulations, although it may perform the testing of an aircraft with its own personnel. (Id., § 21.33; United States v. S.A. Empresa de Viacao Aerea Rio Grandense (1984) ___ U.S. ___, ___ [104 S.Ct. 2755, 2766-2767].) Beech was authorized by the FAA to act in accordance the "delegation option" procedure.

Under the doctrine of preemption, federal law prevails over state law if Congress has expressed an intent to occupy a given field in which federal law is supreme. But even if there is no such intent, state law is preempted if it conflicts with federal law so that it is impossible to comply with both, or if the state regulations stand as an obstacle to the accomplishment of the full purposes that Congress sought to achieve. (Pac. Gas & Elec. v. St. Energy Resources Conserv. (1984) ___ U.S. ___, ___ [103 S.Ct. 1713, 1722].) Courts are reluctant to infer preemption, and it is the burden of the party claiming that Congress intended to preempt state law to prove it. (Exxon Corp. v. Governor of Maryland (1978) 437 U.S. 117, 132; New York Dept. of Social Services v. Dublino (1973) 413 U.S. 405, 413.)

Applying these principles to the present case, we begin with the observation that there is nothing inherently inconsistent in the proposition that even if the federal government has entirely occupied the field of regulating an activity a state may simultaneously grant damages for violation of such regulations.

This precept was recognized in the recent decision in Silkwood v. Kerr-McGee Corp. (1984) ____ U.S. ____ [104 S.Ct. 615]. The court there acknowledged the "tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability," but held that in the field of nuclear safety regulation "Congress intended to stand by both concepts and to tolerate whatever tension there was between them." (Id. at p. ____ [104 S.Ct. at p. 625].)

In *Silkwood* the federal government had enacted regulations concerning the safety of nuclear power plants and the licensing of such plants. These regulations occupied the field of safety to the exclusion of state enactments on the subject. Nevertheless, the high court ruled that common law tort principles of Oklahoma law were applicable to hold the defendant employer liable to an employee for compensatory and punitive damages as the result of radiation at the defendant's plant.[5] After a close analysis of the legislative background of federal laws relating to nuclear power, the court concluded that Congress had assumed persons injured by nuclear accidents were free to utilize state court remedies, and that "traditional principles of state tort law would apply with full force unless they were expressly supplanted." (Id. at p. ____ [104 S.Ct. at p. 625].)

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[5] In *Silkwood* the plaintiff made no claim under the doctrine of negligence per se, but alleged strict liability and common law negligence.

Here, there can be no question as to the intent of Congress to allow the states to apply their own laws in tort actions against aircraft manufacturers for the defective design of airplanes, in spite of the fact that federal law may have completely occupied the field of regulation of aircraft safety and certification. The Federal Aviation Act of 1958 expressly declares that its provisions are not intended to abridge remedies that a party may have under state law. (49 U.S.C. § 1506.) The doctrine of negligence per se is one of those remedies.

Since Congress has clearly allowed state tort remedies, the critical issues before us are not whether it has fully occupied the field of aircraft regulation, but whether there is an "irreconcilable conflict between the federal and state standards or whether the imposition of a state standard in a damages action would frustrate the objectives of the federal law." (*Silkwood*, ____ U.S. at p. ____ [104 S.Ct. at p. 626].)[6]

We can discern here no irreconcilable conflict between federal and state standards. Plaintiffs do not challenge the power of the FAA to adopt safety regulations or to certify aircraft as complying with those regulations. Nor do they seek to revoke the certification of the Travel Air. Even if the jury found that the Travel Air was defective

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[6] The holding of *Silkwood* does not mean, of course, that a state damage remedy is always available when Congress has occupied a regulatory field. Beech relies on Chicago & N. W. Tr. Co. v. Kalo Brick & Tile Co. (1981) 450 U.S. 311, which holds that a state may not allow the imposition of damages against a carrier for the abandonment of a rail route if Congress has authorized the abandonment on a showing of reasonableness in a proceeding before the Interstate Commerce Commission and the commission has decided the issue in the carrier's favor. The case at bar is readily distinguishable: Congress has allowed a state damage action for violation of FAA regulations, plaintiffs had no interest in the certification process as such at the time it occurred, and as we shall see, there is no inconsistency between the jury verdict and the FAA certification.

on the basis of the negligence per se instruction, this would have no effect on the FAA's power to certify aircraft, or on the validity of its certification decisions. It is important to note that the negligence per se instruction plays a very limited role in the context of a state court's obligation to accord deference to the FAA's decisions regarding the safety of aircraft. In essence, it allows the jury to find defective an airplane design that the FAA has approved as safe. But a jury may make the same determination without the instruction because, as Beech concedes, it could find a manufacturer liable for defective design even if the airplane complies with every regulation. The negligence per se instruction therefore affects only the jury's *reason* for finding a design defect, rather than its power to find such a defect in the face of FAA certification.

In many respects this case is stronger for plaintiffs on the issue of conflict between federal and state law than *Silkwood*. There, the federal government had the authority to impose civil penalties against a licensee for a violation of nuclear radiation standards. Nevertheless, the court held that a state tort remedy did not raise a conflict because it would not be physically impossible for defendant to pay both the federal fine and the state-imposed damages. (*Silkwood*, ____ U.S. at p. ____ [104 S.Ct. at p. 626].) We cannot say here that allowing the jury to find Beech guilty of negligence per se "create[s] a significant risk of prohibition of protected conduct, . . ." (Sears, Roebuck & Co. v. Carpenters (1978) 436 U.S. 180, 207.)

The final question to be analyzed is whether state law imposes an obstacle to the federal regulatory scheme. Again, we cannot conclude that the administration of the certification program is threatened by allowing a state to hold a manufacturer liable under negligence per se principles. If anything, the converse is true. As we have seen, the certification program is largely administered by the manufacturer, which develops the plans and performs the tests to assure that the design complies with safety reg-

ulations. Although the FAA also has the power to perform tests, its basic function is to police the manufacturer's compliance. An inquiry in a state court into whether the manufacturer in fact complied with the regulations, such as the extensive testimony in the present case of post-accident flight tests of the Travel Air and the relation of the results of those tests to the requirements of the safety regulations, would assist the FAA in policing a manufacturer's compliance rather than hampering the agency in this regard.[7]

We agree with the observation of a federal court that the "complex and exacting scheme of regulation developed by the FAA . . . must be reinforced and strengthened by courts called on to develop rules of liability and damages in situations . . . where it is apparent that high standards consistent with the regulatory scheme have not been maintained with resulting injury to persons and property." (Fisher v. Bell Helicopter Company (D.D.C. 1975) 403 F.Supp. 1165, 1172.) A rule that allows the jury to consider whether a manufacturer of airplanes complied with FAA safety regulations is in keeping with this objective.

The purpose of the regulations is to protect those who fly in airplanes or are affected by their flight. (See e.g., Arney v. United States (9th Cir. 1973) 479 F.2d 653, 658; Rauch v. United Instruments, Inc. (3d Cir. 1976) 548 F.2d 452, 457; In re Air Crash Disaster Near Silver Plume, Colo. (D.Kan. 1977) 445 F.Supp. 384, 400; Starr v. United

[7] Plaintiffs devote a considerable portion of their briefs to the process by which the Travel Air was certified, claiming that it amounted to "self-certification." We do not understand these references as a challenge to the federal government's right to allow manufacturers primary responsibility to assure compliance with the regulations (49 U.S.C. § 1355 (a)), but rather, as an attempt to support plaintiffs' argument that Beech was liable for the defects in question despite FAA certification.

States (N.D.Tex. 1975) 393 F.Supp. 1359, 1364.)[8] This goal would be enhanced rather than defeated by allowing a jury to consider whether the design of an aircraft complies with safety regulations. If, for example, a manufacturer (with or without the presence of an FAA inspector) failed to perform the tests required to assure that an airplane design met safety regulations, the public safety would not be promoted by precluding a jury from considering whether there was compliance, on the ground that the agency had issued a type certificate. A state court investigation of the issue in the context of an action for damages promotes the safety of the traveling public by revealing violations or defects which may not have come to the attention of the FAA at the time it issued the certificate.

The possibility of error in certification is more than an abstruse theory. In the present case, the Travel Air was not spin tested in 1957 because an FAA official interpreted the safety regulations as not requiring such a test. After a Travel Air crashed in 1958, the Washington headquarters of the agency advised the region that the regulations required spin testing, and the aircraft was in fact tested, as described below.

Beech insists that the only remedy available to a party who claims that an aircraft design does not comply with safety regulations is to bring an action in the federal district court within 60 days of the issuance of a type certificate to challenge certification (49 U.S.C. § 1486 (a); O'Donnell v. Bond (D.D.C. 1981) 510 F.Supp. 925, 931), or to initiate a complaint before the FAA itself (49 U.S.C. § 1482 (a)). These statutes allow review or investigation of FAA orders, including certification orders. But the ob-

[8] We reject Beech's claim that the purpose of the safety regulations is primarily to guide the FAA in making decisions regarding the issuance of type certificates. As should be obvious, and as the cases cited above establish, the regulations are aimed at protecting the public.

ject of plaintiffs in this lawsuit was not to revoke the certificate of the Travel Air or to require that additional tests be performed, and they did not directly challenge the FAA's issuance of the certificate. The statutes relied on by Beech provide no damage remedy to the traveling public for improper certification. A passenger on an airplane cannot be expected to investigate the basis on which the aircraft was certified before he embarks on a journey; the practical impact of barring an action for damages would be that the very persons for whose protection the regulations were designed would be denied a remedy for their violation.

The parties cite numerous cases in support of their respective positions. Plaintiffs rely on cases holding that the negligence per se doctrine applies to FAA regulations, while Beech cites cases which it claims hold to the contrary. With the exception of McGee v. Cessna Aircraft Co. (1983) 139 Cal.App.3d 179, 186-187, these cases are not directly relevant to the issue before us.[9] In *McGee*, it was recognized in a case alleging a design defect that FAA safety regulations are entitled to as much weight as statutes and ordinances for the purpose of section 669 of the Evidence Code. While the holding of *McGee* favors plaintiffs, the opinion does not discuss the preemption issue.

[9] The remaining cases cited by plaintiffs are not helpful since for the most part they do not relate to airplane design but to operational safety standards regulating the conduct of flight crews and air controllers. (E.g., Gatenby v. Altoona Aviation Corporation (3d Cir. 1968) 407 F.2d 443; Rudelson v. United States (C.D.Cal. 1977) 431 F.Supp. 1101; Todd v. United States (M.D.Fla. 1975) 384 F.Supp. 1284.) The issue of a conflict between FAA certification of design and a jury's award of damages based on alleged violation of FAA regulations is not involved in these decisions.

Beech cites two cases for the proposition that a negligence per se instruction cannot be based on the violation of FAA regulations, but in one it was held that the defendants had not violated the regulations (Fisher v. Bell Helicopter Company, supra, 403 F.Supp. 1165, 1174), and in the other the regulation was advisory rather than mandatory (Diamond v. Grow (1966) 243 Cal.App.2d 396, 401).

For the foregoing reasons we hold that Beech has failed to meet its burden of proving that the doctrine of preemption precluded the jury from finding Beech liable for negligence in the design of the Travel Air on the basis of its violation of FAA safety regulations.

Beech also contends that the negligence per se instruction allowed the jury to focus its attention on whether the FAA was justified in delegating responsibility for certain steps in the certification process to Beech, rather than on whether the Travel Air was defective. It cites statements from the argument of plaintiffs' counsel to the jury asserting that the FAA was not doing its job by allowing Beech to assume primary responsibility for certifying the Travel Air. The instruction, however, did not mention Beech's role in the certification process; and Beech waived any right to complain of counsel's argument by its failure to object and ask for an admonition. (Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal.3d 285, 302-303.)

Beech next complains of certain evidentiary rulings. First, it asserts that the court erred in allowing plaintiffs to cross-examine Hermes, the former FAA official who testified regarding the certification of the Travel Air, as to the contents of a report to a congressional subcommittee.[10] The report referred to a study performed by an unidentified employee of the General Accounting Office which allegedly showed that Beech and other aircraft manufacturers had failed to carry out their responsibilities in connection with the certification process. The court admitted the report, over Beech's objection, after plaintiffs conceded its hearsay character but claimed that it was

[10] Hermes testified on direct examination that Beech had qualified as the designated representative of the FAA because of its honesty and integrity. The report assertedly challenged this testimony.

both relevant and admissible under the "official records" exception to the hearsay rule. (Evid. Code, § 1280.)[11]

Plaintiffs' attorney then read from the study a statement that in 1971 FAA officials considered withdrawing Beech's authorization to participate in the certification process because Beech (1) had concealed known certification problems; (2) had engaged in prolonged and unresponsive discussions with the FAA concerning its requirements; (3) was reluctant to disclose certification-relevant material; (4) followed unconventional flight test techniques; and (5) did not properly evaluate technical references to earlier design. Plaintiffs' attorney asked Hermes whether he agreed with these evaluations, and Hermes testified that he did not.

This same report was excluded as hearsay in Baker v. Beech Aircraft Corp. (1979) 96 Cal.App.3d 321, 338-339, on the ground that there was no evidence as to the identity and qualifications of the individuals who prepared it, the facts upon which they based the report, or the circumstances under which it was prepared.

Beech claims that not only was the report inadmissible as hearsay (Love v. Wolf (1964) 226 Cal.App.2d 378, 403), but its contents were irrelevant, as it related to an opinion of FAA officials in 1971, seven years after Hermes left his position at the FAA's central regional office, where his contacts with Beech had occurred, and thirteen years after the Travel Air was certified.

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[11] Section 1280 of the Evidence Code provides:

"Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

"(a) The writing was made by and within the scope of duty of a public employee;

"(b) The writing was made at or near the time of the act, condition, or event; and

"(c) The sources of information and method and time of preparation were such as to indicate its trustworthiness."

We agree with Beech that court should not have allowed plaintiffs to read from the document in their cross-examination of Hermes. The third prong of the "official records" exception to the hearsay rule is that the "sources of information and method and time of preparation" of the record must be "such as to indicate its trustworthiness." (Evid. Code, § 1280, subd. (c).) Since the author of the study and the identity of the FAA officials who considered cancellation of Beech's certification authorization were unknown, and the study was made several years after Hermes' contact with Beech in the FAA central region had terminated, its trustworthiness and relevance were questionable. Thus, the study did not come within the exception to the hearsay rule for official records set forth in section 1280 of the Evidence Code.

We cannot conclude that the error was prejudicial, however. While these accusations tended to place Beech in an unfavorable light in the eyes of the jury, they referred to Beech's conduct in relation to certification in a general sense, without regard to the certification of any specific airplane. Moreover, the accusations against Beech were made 13 years after the Travel Air was certified, thereby diminishing its apparent relevance. On the other hand, there was voluminous testimony regarding the testing of the Travel Air, Beech's relationship to the FAA during the certification process, the requirements of the safety regulations, and the respects in which Beech failed to comply with them. This evidence was ample to support a determination by the jury in plaintiffs' favor, and it is doubtful whether the few references to the report during a four-month trial were a serious detriment to Beech. Under all the circumstances, we cannot conclude it is reasonably probable that a result more favorable to Beech would have been reached absent the references to the report at trial. (Cal.Const., art. VI, § 13; People v. Watson (1956) 46 Cal.2d 818, 836.)

Another asserted error was the admission of evidence of other accidents involving aircraft built by Beech. Over Beech's objections, the court allowed plaintiffs to cross-

examine Hermes regarding 20 stall/spin accidents of Beech aircraft; 15 of these involved the Baron, another model built by Beech, and 5 the Travel Air.[12]

Evidence of prior accidents is admissible to prove a defective condition, knowledge, or the cause of an accident, provided that the circumstances of the other accidents are similar and not too remote. (Ault v. International Harvester Co. (1974) 13 Cal.3d 113, 121-122.) Beech contends the other accidents were dissimilar to the event in the present case in a number of respects: most of the accidents occurred in the Baron, an airplane different from the Travel Air; although they all involved the stall and spin of the aircraft, there was no evidence whether the airplanes entered the spin from a single engine stall, such as occurred in the present case; and other factors such as pilot error or overloading might have been responsible for the accidents.

Plaintiffs introduced expert testimony that the defect in the design of the Travel Air was in its wings, which cause the aircraft to spin unduly in a single engine stall; that the Baron had the same design defect; and that this common characteristic produces identical single engine stall/spin characteristics. This evidence of the similarity in the design of the Baron and the Travel Air was sufficient to justify the court's conclusion that evidence regarding accidents in the Baron was admissible.

Moreover, even if the accidents did not occur in precisely the same manner as in the present case, testimony regarding the accidents that occurred prior to the crash of the Travel Air in this case was admissible to show that

[12] Beech argues that it was error to receive evidence of four of these twenty accidents involving the Baron on the ground that it was cumulative because they had been previously described to the jury. Whether or not this ruling was error, it was harmless under *Watson*.

Beech had notice of a dangerous condition.[13] For this purpose, " ' "all that is required . . . is that the previous injury should be such as to attract the defendant's attention to the dangerous situation. . . ." ' " (Hasson v. Ford Motor Co. (1982) 32 Cal.3d 388, 404.) There can be no question that the prior accidents should have alerted Beech to the faulty spinning characteristics of the Travel Air. It was contrary to FAA regulations to spin either the Baron or the Travel Air, and Beech should therefore have been alerted to the fact that the spinning of the airplanes in the prior accidents was unintentional and may have been due to a defect in their design.[14]

Beech's final argument is that the court erred in denying its motion for a new trial on the ground of jury misconduct. The jury began its deliberations on January 2, 1980, and returned its verdict on January 14. On Decem-

[13] We recognize that only 13 of the accidents on the list of 20 occurred prior to the accident in the present case, and only these accidents could have provided notice to Beech of a defect. Nevertheless, the admission of evidence of all 20 accidents was not prejudicial. Prior to the examination of Hermes regarding these 20 accidents, the court admitted evidence regarding 4 additional accidents involving the Travel Air. Thus, the overall effect was only that the jury learned about 24 accidents, only 17 of which occurred before the crash of the Travel Air in this case.

[14] We also reject Beech's claim that the court improperly allowed plaintiffs to refer to a report of flight tests performed by the United States Army of the Beech T-42A model, the military version of the Baron. The pilot who had performed the tests and expressed his opinion of the reactions of the airplane in the report had died prior to the trial. Beech objected to the report on the ground that it was hearsay, and plaintiffs later withdrew it from evidence; but they used the contents of the report in cross-examining witnesses, and referred to it in closing argument. A witness who monitored the pilot's actions in the cockpit and read the instruments during the test, and who was a coauthor of the report, testified at some length concerning the tests. We cannot say that the court erred in finding that he was sufficiently knowledgeable about the tests to allow the use of the report in the examination of witnesses.

ber 30, during the Christmas recess, the television series "60 Minutes" broadcast a program criticizing the safety record of light aircraft.

On February 25 a juror who had voted in Beech's favor signed a declaration stating that two jurors had "indicated that they had seen the program."[15] No counteraffidavits were filed. Beech argued in its motion for a new trial that this event amounted to prejudicial misconduct. The court viewed a videotape of the broadcast, and a transcription of the tape was appended to Beech's motion for a new trial.

During the broadcast, the participants made a number of references to pilot error as the cause of air crashes. In denying Beech's motion for a new trial the court observed that "it would be hard to say who . . . [the broadcast] hurt the most and who it hurt the least. There was certainly more than a passing reference to pilot error, and frankly, my own view is that Beech didn't come off all that bad. . . . I think someone would walk away from that program thinking that most of these crashes are caused by pilot error. . . . [M]any comments were that these people just do not have the wherewithal to be able to fly these airplanes safely." The court stated that it had instructed the jury to set aside any extrinsic "evidence," and "the mere fact that a juror without meaning to is made aware of something with respect to the same subject matter outside the courtroom does not mean that he is taking evidence because I think they were adequately advised . . . that the evidence comes from the witnesses who . . . testify from the witness stand under oath. I don't

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[15] Plaintiffs argue in their brief that the juror's declaration was inadmissible as hearsay, and that Beech's attorney's affidavit that he did not have knowledge of the conduct of the jurors until after the verdict was insufficient because Beech did not also disclaim such lack of knowledge. (Weathers v. Kaiser Foundation Hospitals (1971) 5 Cal.3d 98, 103.) Whatever the merit of these assertions, the record does not establish that plaintiffs raised them in the trial court, and they must therefore be deemed waived.

have any doubt in my mind but what the jurors were clear on that subject."

Beech argues that the two jurors who viewed the program were guilty of misconduct, and that such misconduct raises a presumption of prejudice. (People v. Pierce (1979) 24 Cal.3d 199, 207.) In support of its assertion, it cites cases in which a juror deliberately received evidence outside the courtroom. (E.g., People v. Pierce, supra, 24 Cal.3d 199 [juror discussed trial with prosecution witness]; Anderson v. Pacific Gas & E. Co. (1963) 218 Cal.App.2d 276 [juror independently visited scene of accident]; Kritzer v. Citron (1950) 101 Cal.App.2d 33 [juror asked for outside medical opinion in malpractice case].)

Here, however, the jurors in question did not deliberately set out to discover information regarding the issues at the trial; they simply watched a popular television program that happened to discuss the subject matter of the trial in a general way. The conduct of these jurors was comparable to that described in Hasson v. Ford Motor Co., supra, 32 Cal.3d 388, 408-409. *Hasson* was a products liability case in which several acts of juror misconduct were alleged by Ford. One was that a juror who attended nighttime paralegal classes during the trial heard a lecturer discuss a successful action against Ford for products liability involving another Ford model. The lecturer told the class that Ford was subjected to punitive damages because it had deliberately abstained from modifying the automobile to make it more safe in order to save money. We held this did not amount to misconduct because the juror did not deliberately solicit the statements but "inadvertently attended a single class where the subject of an arguably related piece of litigation was mentioned in passing."

But even if we were to agree with Beech that the jurors committed misconduct by watching the program and that a presumption of prejudice arose as a result (People v. Pierce, supra, 24 Cal.3d 199, 207), the presumption was rebutted. In *Hasson* we set out the test to be applied

in determining whether juror misconduct resulted in prejudice. The court must examine the record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct. Some of the factors to be considered in this connection are "the strength of the evidence that misconduct occurred, the nature and seriousness of the misconduct, and the probability that actual prejudice may have ensued." (32 Cal.3d at p. 417.)

An examination of these matters leads us to the same conclusion as the trial court, i.e., that no prejudice resulted from the conduct of these jurors. Evidence of misconduct was not convincing, to say the least. It consisted of the affidavit of one juror that "two jurors indicated that they had seen the program." The affiant was uncertain of the identity of one of these jurors; there is no indication that either juror saw the whole program; and the declaration lacks specificity regarding the actual statements of the two jurors, and the circumstances under which they were made.

The misconduct, if it occurred, was not serious in the sense of revealing a deliberate act by the two jurors in violation of instructions to confine their consideration of the case to the evidence they heard in the courtroom. There was no way for the jurors to know in advance that Beech's name would be fortuitously mentioned in the broadcast, or that the relationship between airplane manufacturers and the FAA would be discussed, or indeed the subject matter of this weekly television show.

Most important, it is highly unlikely that the jurors were prejudiced by viewing the program. The remarks of the two jurors that they had viewed the program were not made in the jury room; and the broadcast made no reference to the Travel Air or to the accident in issue here.

Finally, we have read the transcript of the "60 Minutes" broadcast, and, like the trial court, we are unable to conclude whether it favored plaintiffs' theory of a design

defect in the Travel Air or Beech's claim of pilot error. In our view, any misconduct was not "of such a character as is likely to have influenced the verdict improperly." (Evid. Code, § 1150, subd. (a).)

The judgment is affirmed.

MOSK, J.

WE CONCUR:

Bird, C.J.
Kaus, J.
Broussard, J.
Reynoso, J.
Grodin, J.
Lucas, J.

ELSWORTH v. BEECH AIRCRAFT CORP.
L.A. 31838

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TRIAL COURT & NUMBER:	Los Angeles Superior Court C-101044
TRIAL JUDGE:	Hon. William Drake

IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

[Filed September 26, 1983]

DORIS ELSWORTH, et al.,

Plaintiffs and Respondents,

v.

BEECH AIRCRAFT CORPORATION,

Defendant and Appellant.

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2 Civil No. 63299

(Super. Ct. No. C101044 &
Super. Ct. No. C126505)

APPEAL from a judgment of the Superior Court of Los Angeles County. William Drake, Judge. Reversed.

Morris, Polich & Purdy, Landon Morris, Robert S. Wolfe, Gerald P. Schneeweis, Gibson, Dunn & Crutcher and Robert Forgnone, for Defendant and Appellant.

Magana, Cathcart, McCarthy & Pierry, Daniel C. Cathcart and Deborah Mitzenmacher, for Plaintiffs and Respondents Elsworth, Best and Dunaway.

The Boccardo Law Firm, James F. Boccardo, Edward J. Niland, and Stanley A. Ibler, Sr., for Plaintiffs and Respondents, Jo Ann Miro, et al.

Defendant, Beech Aircraft, appeals from an adverse judgment in an action for wrongful death.

In June 1971, an airplane, Travel Air Model 95, manufactured by Beech, with engines manufactured by Avco-Lycoming, crashed while one Miro was operating it in a demonstration for three prospective buyers—Elsworth, Best and Dunaway. Miro and his three passengers were killed in the crash. The heirs of the passengers brought this action for wrongful death against the estate of Miro and his family-owned firm (Miro Aviation, Inc.), Beech and Avco-Lycoming. Miro's estate cross-complained against Beech and Avco-Lycoming. After a trial by jury, verdicts were returned against Beech on the complaint and cross-complaint and in favor of Avco-Lycoming. Beech here appeals from the judgment against it entered on those verdicts.[1] For the reasons set forth below, we reverse the judgments.

Investigations of the wreckage disclosed that one engine had not been operating at the time of the accident. The theory of the case against Avco-Lycoming was that that engine had quit due to a bad valve, causing the stall and spin which resulted in the crash. The verdict in favor of Avco-Lycoming resolved that theory. Another theory was that the pilot, Miro, had shut off the engine in order to demonstrate the plane's ability to fly with only one engine operating. The theory of the case against Beech was that the airplane was so poorly designed as to have an undue tendency to stall and spin, especially with only one engine operating. The Beech defense was that the plane was properly designed and that the accident was caused by the pilot, Miro's, negligence in demonstrating

[1] Prior to trial, Miro's insurance carrier had settled with the estates of the passengers for the policy limits of $100,000 each. The judgments, as entered by the court, reflected credit to Beech for those settlements. The briefs assume that the judgment in favor of Miro's heirs was also reduced by some factor reflecting a degree of concurrent negligence on the part of Miro.

a one engine operation at too low a speed and too near the ground to correct an unintentional stall and spin.

The case, as against Beech, therefore proceeded on theories of strict liability and negligence for defective design and negligence per se in its construction. The jury was instructed, and evidence was admitted, on those theories.

I

Part of the case for plaintiffs was based on the contention that, although the model in question had been certified as safe by the Federal Aviation Authority, its certification was flawed by the fact that part of the testing had been conducted by employees of Beech. We need not discuss the validity of that attack, since the record shows that, after the initial certification of the Travel Air Model 95, in 1957, a plane of that model crashed, killing the son of a United States senator. After that crash, the FAA itself retested the plane, in 1958, using inspectors who were its own employees. On the recommendation of those employees, after their independent tests, the certificate was officially declared as being still in force. The plane here involved was operated under that renewed, 1958, certification. It follows that, insofar as the case at bench is concerned, it is that later certification that is material and the defects, if any, in the earlier testing, in 1957, by Beech employees is of no significance.

II

A second prong of plaintiff's attack was the contention that, although certified, the model in fact failed to meet the certification standards for safety with respect to stall characteristics set forth in regulations promulgated by the FAA and its predecessor, the Civil Aeronautics Board, and that it was defectively designed, in that it had an undue tendency to stall and spin. In support of that theory, the trial court permitted experts to testify on behalf of the plaintiffs regarding the propriety of the certi-

fication. In so acting, the trial court erred. The design of aircraft, particularly with respect to the possibility of stalls and spins is an admittedly highly complex act. Congress has committed the determination of whether a particular design meets legitimate safety standards to an agency, the FAA, with expertise in that area. That procedure is denominated certification. The statutes governing the FAA provide a remedy against improper certification by way of a direct challenge in the Court of Appeals of the United States or the United States Court of Appeals for the District of Columbia. That certification may not be attacked in state courts. If an airplane is manufactured according to the certificate, a state court may not, as this trial court did, instruct a jury to *presume* Beech negligent if it found that the certification did not meet the FAA standards relating to this model of plane. Negligence per se cannot be used to impose liability for the crash herein involved. In permitting such collateral attack on the certificate of the Travel Air Model 95, the trial court committed reversible error.

That does not mean that any civil trier of fact is foreclosed from considering whether there is a design defect in an airplane model that has been issued an FAA certificate of airworthiness, as had the airplane in the case at bench. We have been cited no California case directly in point and our research has disclosed none. *Wilson v. Piper Aircraft Corp.* (1978) 282 Or. 61, 577 P.2d 1322, involved wrongful death actions based on strict liability against the manufacturer of a Piper aircraft. That court held that compliance with FAA standards was not a complete defense, but concluded that it was proper to take into consideration, in determining whether the plaintiffs had produced sufficient evidence of defect to go to the jury, the fact that the regulatory agency, after considering the dangers involved had approved the very engine design of which the plaintiffs complained.

More importantly, however, the *Wilson* court squarely rejected the position of the defendant therein that "the airplane's design could not be dangerously defective since

it met the applicable FAA safety standards, and that FAA approval of the design . . . foreclosed any further inquiry into its adequacy from a safety standpoint. [¶] We have found no support for this position. Neither the applicable statutes themselves, 49 U.S.C. §§ 1421(a)(1) and 1423(a) and (c), nor the legislative history (see 1958 U.S. Code Cong. & Admin. News, p. 3741) indicates any Congressional intent to provide that FAA approval of either the general model design or the airworthiness of the particular craft is a complete defense to the claim of civil liability for faulty design. Indeed, 49 U.S.C. § 1421(a)(1) provides that the FAA design standards are minimum standards only.[1] [¶] We have, in other contexts, refused to hold compliance with statutory or administrative safety standards to be conclusive on the question of tort liability where there is no evidence of a legislative intent that the standards are to be applied for that purpose. *McMullen v. Volkswagen of America*, 274 Or. 83, 88-89, 545 P.2d 117 (1976); *McEwen v. Ortho Pharmaceutical*, 270 Or. 375, 397-98, 528 P.2d 522 (1974). See also *Koch v. So. Pac. Transp. Co.*, 274 Or. 499, 504, 547 P.2d 589 (1976). Cf. *Lewis v. Baker*, 243 Or. 317, 413 P.2d 400 (1966). Other courts have treated compliance with the FAA safety standards as appropriate for consideration by the trier of fact in products liability cases involving aircraft. See, e.g., *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442, 446 (10th Cir. 1976); *Banko v. Continental Motors Corporation*, 373 F.2d 314, 315-16 (4th Cir. 1966); *Berkebile v. Brantly Helicopter Corporation*, 219 Pa. Super. 479, 281 A.2d 707, 710 (1971). We have found no cases holding that compliance is a complete defense. We

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Wilson v. Piper Aircraft, supra, 282 Or. 61 quoted the pertinent part of that statute which read as follows:

" '1. (a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time: [¶] (1) Such minimum standards governing the design, materials, workmanship, construction and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety; [¶] . . . .' "

hold that it is not." (*Wilson v. Piper Aircraft Corp.*, *supra*, 282 Or. 61, 577 P.2d 1322 at pp. 1324-1325; see also 97 A.L.R.3d 606, lending support to the foregoing position.)

Ferguson v. Cessna Aircraft Co. (1981) 132 Ariz. 47, 643 P.2d 1017, 1019, held: "The fact that the design of the [airplane involved in the accident therein] was specifically approved by the Federal Aviation Administration (FAA), while admissible evidence, does not provide a complete defense to a charge of design defect." (Citing *Wilson v. Piper Aircraft Corp.*, *supra*.) Courts have sometimes treated compliance with the FAA safety standards as appropriate for consideration by the trier of fact in product liability cases involving aircraft. (See, e.g., *Bruce v. Martin-Marietta Corp.* (10th Cir. 1976) 544 F.2d 442, 446; *Banko v. Continental Motors Corporation* (4th Cir. 1966) 373 F.2 314, 315-316; and *Berkebile v. Brantly Helicopter Corp.* (1971) 219 Pa.Super. 479, 281 A.2d 707, 710.) We have found no cases holding that compliance is a complete defense. We hold that it is not.

Moreover, this view is in accord with the general principles of California law, and the weight of authority on the subject. State triers of fact, including juries, may, and do, determine questions of negligence and strict liability for defective products. As was stated in *Lozano v. Pacific Gas & Elec. Co.* (1945) 70 Cal.App.2d 415, 424: " 'It does not follow that merely because one has complied with the terms of a statute or ordinance that he is thereby absolved from negligence. One may act in strict conformity with the terms of an enactment and yet not exercise the amount of care which is required under the circumstances.' (19 Cal. Jur. 634. See also, *Campbell v. Fong Wan*, 60 Cal. App.2d 553 [141 P.2d 43]; *Sickles v. Mt. Whitney etc. Co.* 177 Cal. 278 [170 P. 599]; *Monroe v. San Joaquin etc. Co.*, *supra*.) In other words, the question is whether under all of the circumstances negligence has been shown. [¶] . . . . The duty of care exists in the absence of any statute and if care is omitted and injury directly results therefrom liability arises. [Citations.]"

"Compliance with a law or administrative regulation relieves the actor of negligence per se, but it does not establish as a matter of law that due care was exercised. *Grand Trunk Ry. Co. of Canada v. Ives*, 144 U.S. 408, 12 S.Ct. 679, 36 L.Ed. 485 (1892); *Maize v. Atlantic Refining Co.*, 352 Pa. 51, 41 A.2d 850 (1945); *Hubbard-Hall Chemical Co. v. Silverman*, 340 F.2d 402 (1st Cir. 1965). 'The care to be exercised in a particular case must always be proportionate to the seriousness of the consequences which are reasonably to be anticipated as a result of the conduct in question.' *Maize, supra*, at 56-57, 41 A.2d at 853. Compliance with the statute or regulation is admissible as evidence of the actor's exercise of due care, but such compliance 'does not prevent a finding of negligence where a reasonable man would take additional precautions.' Restatement (Second) of Torts § 288C (1965)" (*Berkebile v. Brantly Helicopter Corporation, supra*, 219 Pa.Super. 479, 281 A.2d 707, 710; *Bruce v. Martin-Marietta Corp., supra*, 544 F.2d 442, 446; *Mittelman v. Siefert* (1971) 17 Cal.App.3d 51, 62.) We think that rule is equally applicable to the certification of the aircraft here involved.

We observe that California Constitution, article 1, section 16 (formerly art. I, § 7) provides in pertinent part: "Trial by jury is an inviolate right and shall be secured to all, . . ." See also Code of Civil Procedure section 592, providing in pertinent part that in an action for money claimed for injuries "an issue of fact must be tried by a jury, . . ." This is a matter of right, denial of which is both reversible error and an act in excess of jurisdiction. (See 4 Witkin, Cal. Procedure (2d ed., 1983 supp.) Trial, § 73, pp. 136-137.)

III

Since respondents proceeded on the theory of strict liability as well as negligence, we note that the rule is one of strict liability to the user or consumer even though he has exercised all possible care in the preparation and sale

of the product. Thus while the jury was entitled to consider evidence of certification, such evidence was not conclusive on the question of whether there is a design defect in the airplane that contributed as a proximate or legal cause to the plaintiffs' injuries and damages.

We hold that for the purpose of imposing civil liability on manufacturers, preparers, distributors, wholesalers, sellers or lessors of such defectively designed products, lay juries in personal injury actions may determine complex questions of fact, including questions of whether there are design defects in products, including airplanes, which cause injury or damage.

California law sets out that a product is defective in design (1) unless the benefits of the design of the product as a whole outweigh the risk of damage inherent in the design, or (2) if the product fails to perform as safely as an ordinary consumer of the product would expect when used in a manner reasonably foreseeable by the defendant. (See *Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413; see also *Grimshaw v. Ford Motor Co.* (1981) 119 Cal.App.3d 757 and *Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862.)

That rule of *Barker v. Lull Engineering Co. Inc., supra,* governs and applies to the jury determination of the design safety of the airplane here involved, notwithstanding the FAA certification of the airplane.

A product, even though otherwise faultlessly made, is defective if the use of the product in a manner that is reasonably foreseeable by the defendant involves a substantial danger that would not be readily recognized by the ordinary user of the product and the manufacturer fails to give adequate warning of such danger. (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 349.)

No airplane, regardless of how skillfully designed can, however, be totally free of the possibility of stall and spin if operated without regard to its special characteristics.

Recognizing that fact the cases have held that it is the duty of the manufacturer to warn purchasers and potential pilots of the point at which a stall and spin may occur and of the height at which a plane must be flown to permit recovery from an accidential stall and spin. (See, e.g., *Kastner v. Beech Aircraft Corp.* (1983 Mo. App.) 650 S.W.2d 312.)

In the case at bench, it is uncontested that, when the airplane herein involved was first sold, it was accompanied by a manual which gave adequate warning. Miro, who was a licensed pilot, and a person whose business it was to demonstrate this particular airplane, was, by regulation, required to familiarize himself with that manual. There is no evidence as to whether or not he did so. Nothing in the record before us would support a finding that Beech had failed in its obligation to warn of the operating precautions required of a pilot in charge of this airplane.

IV

It follows that the record contains insufficient evidence to support a finding that Beech had designed, manufactured or sold a defective airplane or that Beech had failed to adequately warn prospective pilots of the operating procedure which were required to maintain the safety of the plane and its occupants.

V

During the period when the jury was deliberating, a television station broadcast a program, known as "60 Minutes," in which Beech was identified by name and charged with poor manufacturing practices. Admittedly, some of the jurors saw and heard that broadcast. After the verdict was returned against it, Beech sought a new trial claiming prejudice by the jury in viewing and hearing the broadcast. The motion was denied. Since we reverse, and since we take it that on retrial this will not occur again, we need not, and do not, determine whether

Beech waived the matter by waiting until a verdict was returned before raising the issue.

The judgment is reversed.

CERTIFIED FOR PUBLICATION

McCLOSKY, J.

I concur:

AMERIAN, J.

Kingsley, Acting P.J.:

I concur in part and dissent in part.

I agree with most of the majority opinion; but I disagree with its holding that, in this case, the FAA certification was not conclusive on the issue of design defect.

The cases cited and relied on by the majority ignore what I regard as a significant distinction between cases where a manufacturer relies only on having followed general safety regulations and cases where the manufacturer relies on an administrative approval of a specific design.

General safety regulations, by their very nature, set forth minimum standards but do not, and cannot, deal with every individual designed product. It follows that some designs, although complying with minimum safety regulations, may not, in fact, be free of design defects which have caused injury. But here, the certification was that the particular design model herein involved was "airworthy"—i.e., that it was, in fact, safe to fly![2]

As the California cases on design liability cited by the majority hold, it is a defense of a claim of liability based

[2] In the view I take of the effect of the airworthiness certificate, the discussion in the majority opinion of the constitutional right to jury trial is a false issue. The right to jury trial exists only as to issues of fact. If, as I view it, the certificate is conclusive on the "design defect" issue, there is no factual issue to be tried.

on design defect if: (1) the design is as safe as the state of the art permits; (2) the design is as safe as possible that the balance between perfect safety and economic considerations will permit; and (3) the product meets the reasonable expectations of the purchaser. The corollary to the rule relating to the expectation of the buyer-user is the rule, cited by the majority, requiring the manufacturer to give notice of a design problem caused by the state of the art and risk-value rules.

As I read the record, the airworthiness certificate constitutes a decision, binding in this case, that the first two rules on design defect had been made—i.e., that this model of airplane not only met the general regulations, but was as safe as the state of the art permitted and that the airplane could not economically be manufactured with any more safe design and be economically saleable. As the majority admit, it is not possible to design an airplane that will not stall and spin under some conditions.

As I view the record, the third requirement—warning of a possible risk—was here met. Admittedly, when originally sold, the plane was accompanied by a manual which set out the speed and height the plane must be flown to avoid stall, with resultant spin and crash. Under the applicable regulations, it was the duty of Miro, both as a licensed pilot and as the demonstrating distributor of the plane, to be familiar with that manual. It is presumed that official duty is performed. Plaintiffs made no effort to prove otherwise. Thus the explanation for this stall, spin and crash can only be that Miro, in his effort to demonstrate the capacity of the plane he wanted to sell, had deliberately "cut" one engine and then, either negligently or intentionally, flown at too low a speed and at too low an altitude. It follows, in my view, that Beech had no responsibility for the crash but that sole responsibility was that of Miro, whose insurer has compensated the plaintiffs.

I would reverse with directions to grant Beech's motion for judgment NOV.

KINGSLEY, Acting P.J.

ORDER DUE
January 16, 1985

ORDER DENYING REHEARING

L.A. No. 31838

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

ELSWORTH, Et. Al.
Respondents

v.

BEECH AIRCRAFT CORP.,
Appellant

Appellant's petition for rehearing DENIED.

/s/ Bird
Chief Justice

IN THE
SUPREME COURT OF THE
STATE OF CALIFORNIA
REMITTITUR

L.A. No. 31838

DORIS ELSWORTH et al.,

Plaintiffs and Respondents,

vs.

BEECH AIRCRAFT CORPORATION,

Defendant and Appellant.

Appeal
County Los Angeles
Superior Court No. C 126505 and C 101044

The above-entitled cause having been heretofore fully argued and submitted, IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court of the County of Los Angeles in the above-entitled cause, is hereby affirmed. Respondents shall recover costs on appeal.

[Certificate of the Clerk Omitted in Printing]

FEDERAL STATUTES AND REGULATIONS

§ 1421. Powers and duties of Administrator

Minimum standards; rules and regulations

(a) The Administrator is empowered and it shall be his duty to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time:

(1) Such minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety;

(2) Such minimum standards governing appliances as may be required in the interest of safety;

(3) Reasonable rules and regulations and minimum standards governing, in the interest of safety, (A) the inspection, servicing, and overhaul of aircraft, aircraft engines, propellers, and appliances; (B) the equipment and facilities for such inspection, servicing, and overhaul; and (C) in the discretion of the Administrator, the periods for, and the manner in, which such inspection, servicing, and overhaul shall be made, including provision for examinations and reports by properly qualified private persons whose examinations or reports the Administrator may accept in lieu of those made by its officers and employees;

(4) Reasonable rules and regulations governing the reserve supply of aircraft, aircraft engines, propellers, appliances, and aircraft fuel and oil, required in the interest of safety, including the reserve supply of aircraft fuel and oil which shall be carried in flight;

(5) Reasonable rules and regulations governing, in the interest of safety, the maximum hours or periods of service of airmen, and other employees, of air carriers; and

(6) Such reasonable rules and regulations, or minimum standards, governing other practices, methods, and procedure, as the Administrator may find necessary to provide adequately for national security and safety in air commerce.

§ 1423. Aircraft certificates

Authorization to issue; application; investigation; tests; issuance of type certificate

(a)(1) The Administrator is empowered to issue type certificates for aircraft, aircraft engines, and propellers; to specify in regulations the appliances for which the issuance of type certificates is reasonably required in the interest of safety; and to issue such certificates for appliances so specified.

(2) Any interested person may file with the Administrator an application for a type certificate for an aircraft, aircraft engine, propeller, or appliance specified in regulations under paragraph (1) of this subsection. Upon receipt of an application, the Administrator shall make an investigation thereof and may hold hearings thereon. The Administrator shall make, or require the applicant to make, such tests during manufacture and upon completion as the Administrator deems reasonably necessary in the interest of safety, including flight tests and tests of raw materials or any part or appurtenance of such aircraft, aircraft engine, propeller, or appliance. If the Administrator finds that such aircraft, aircraft engine, propeller, or appliance is of proper design, material, specification, construction, and performance for safe operation, and meets the minimum standards, rules, and regulations prescribed by the Administrator, he shall issue a type certificate therefor. The Administrator may prescribe in any such certificate the duration thereof and such other terms, conditions, and limitations as are required in the interest of safety. The Administrator may record upon any certificate issued for aircraft, aircraft engines, or propellers,

a numerical determination of all of the essential factors relative to the performance of the aircraft, aircraft engine, or propeller for which the certificate is issued.

§ 1429. Reinspection or reexamination; amendment, suspension, or revocation of certification

Procedure; notification; hearing; appeal to National Transportation Safety Board; judicial review

(a) The Administrator may, from time to time, reinspect any civil aircraft, aircraft,[1] engine, propeller, appliance, air navigation facility, or air agency, or may reexamine any civil airman. If, as a result of any such reinspection or reexamination, or if, as a result of any other investigation made by the Administrator, he determines that safety in air commerce or air transportation and the public interest requires, the Administrator may issue an order amending, modifying, suspending, or revoking, in whole or in part, any type certificate, production certificate, airworthiness certificate, airman certificate, air carrier operating certificate, air navigation facility certificate (including airport operating certificate), or air agency certificate. Prior to amending, modifying, suspending, or revoking any of the foregoing certificates, the Administrator shall advise the holder thereof as to any charges or other reasons relied upon by the Administrator for his proposed action and, except in cases of emergency, shall provide the holder of such a certificate an opportunity to answer any charges and be heard as to why such certificate should not be amended, modified, suspended, or revoked. Any person whose certificate is affected by such an order of the Administrator under this section may appeal the Administrator's order to the National Transportation Safety Board and the National Transportation Safety Board may, after notice and hearing, amend, modify, or reverse the Administrator's order if it finds that safety in air commerce or air transportation and the public interest do not require affirmation of the Administrator's order. In the conduct of its hearings the National Trans-

portation Safety Board shall not be bound by findings of fact of the Administrator. The filing of an appeal with the National Transportation Safety Board shall stay the effectiveness of the Administrator's order unless the Administrator advises the National Transportation Safety Board that an emergency exists and safety in air commerce or air transportation requires the immediate effectiveness of his order, in which event the order shall remain effective and the National Transportation Safety Board shall finally dispose of the appeal within sixty days after being so advised by the Administrator. The person substantially affected by the National Transportation Safety Board's order may obtain judicial review of said order under the provisions of section 1486 of this title, and the Administrator shall be made a party to such proceedings.

§ 1482. Complaints to and investigations by Administrator and Board

Filing of complaints; complaints against members of Armed Forces

(a) Any person may file with the Administrator or the Board, as to matters within their respective jurisdictions, a complaint in writing with respect to anything done or omitted to be done by any person in contravention of any provisions of this chapter, or of any requirement established pursuant thereto. If the person complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, it shall be the duty of the Administrator or the Board to investigate the matters complained of. Whenever the Administrator or the Board is of the opinion that any complaint does not state facts which warrant an investigation or action, such complaint may be dismissed without hearing. In the case of complaints against a member of the Armed Forces of the United States acting in the performance of his official duties, the Administrator or the Board, as the case may be, shall refer the complaint to the Secretary of the department concerned for action. The

Secretary shall, within ninety days after receiving such a complaint, inform the Administrator or the Board of his disposition of the complaint, including a report as to any corrective or disciplinary actions taken.

§ 1486. Judicial review

Orders subject to review; petition for review

(a) Any order, affirmative or negative, issued by the Board or Administrator under this chapter, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 1461 of this title, shall be subject to review by the courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Venue

(b) A petition under this section shall be filed in the court for the circuit wherein the petitioner resides or has his principal place of business or in the United States Court of Appeals for the District of Columbia.

Notice to Board or Administrator; filing of record

(c) A copy of the petition shall, upon filing, be forthwith transmitted to the Board or Administrator by the clerk of the court, and the Board or Administrator shall thereupon file in the court the record, if any, upon which the order complained of was entered, as provided in section 2112 of Title 28.

Power of court

(d) Upon transmittal of the petition to the Board or Administrator, the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the Board or Administrator. Upon good cause shown and after reasonable notice to the Board or Administrator, interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate.

Conclusiveness of findings of fact; objections

(e) The findings of facts by the Board or Administrator, if supported by substantial evidence, shall be conclusive. No objection to an order of the Board or Administrator shall be considered by the court unless such objection shall have been urged before the Board or Administrator or, if it was not so urged, unless there were reasonable grounds for failure to do so.

Review by Supreme Court

(f) The judgment and decree of the court affirming, modifying, or setting aside any such order of the Board or Administrator shall be subject only to review by the Supreme Court of the United States upon certification or certiorari as provided in section 1254 of Title 28.

14 C.F.R. § 21.33 Inspection and tests.

(a) Each applicant must allow the Administrator to make any inspection and any flight and ground test necessary to determine compliance with the applicable requirements of the Federal Aviation Regulations. However, unless otherwise authorized by the Administrator—

(1) No aircraft, aircraft engine, propeller, or part thereof may be presented to the Administrator for test unless compliance with paragraphs (b)(2) through (b)(4) of

this section has been shown for that aircraft, aircraft engine, propeller, or part thereof; and

(2) No change may be made to an aircraft, aircraft engine, propeller, or part thereof between the time that compliance with paragraphs (b)(2) through (b)(4) of this section is shown for that aircraft, aircraft engine, propeller, or part thereof and the time that it is presented to the Administrator for test.

(b) Each applicant must make all inspections and tests necessary to determine—

(1) Compliance with the applicable airworthiness and aircraft noise requirements;

(2) That materials and products conform to the specifications in the type design;

(3) That parts of the products conform to the drawings in the type design; and

(4) That the manufacturing processes, construction and assembly conform to those specified in the type design.

14 C.F.R. § 21.51 Duration.

A type certificate is effective until surrendered, suspended, revoked, or a termination date is otherwise established by the Administrator.

FAA REPORT ON COMPLIANCE WITH CIVIL AIR REGULATIONS

DEPARTMENT OF COMMERCE
CIVIL AERONAUTICS
ADMINISTRATION

Beech Aircraft Corporation
Wichita, Kansas

RECORD OF VISIT OR CONFERENCE

TRIP REPORT

DATE

☐ VISIT ☐ CONFERENCE

August 6, 1958

PURPOSE OF VISIT OR SUBJECT OF CONFERENCE

The writer visited Beech Aircraft Corporation at Wichita, Kansas on August 6, 1958 to participate in the Aircraft Engineering Division phase of the Model 95 accident investigation. Mr. Ike Hoover of the CAB Washington office was present and participated in conferences held with Beech personnel who were concerned with the type certification of the Model 95. A flight demonstration by Mr. Steve Tuttle (Beech Engineering Flight Test Pilot) of the airplane's spin characteristics was planned for the morning of August 7.

The test airplane, Serial No. TD 127 (N668T), was a standard Model 95 modified for flight test purposes. Rip hinge pins were installed on the right door and a shot tank installation was provided in the baggage compartment area. The airplane was loaded to duplicate as closely as possible the loading of the Model 95 involved in a fatal accident near Little Rock, Arkansas. The determination of this flight test loading is given on page 6 of Beech Aircraft Corporation Weight Control Report No. 1185, which is included as Appendix A to the attached TIR for the Beech Model 95. A spin chute had previously been installed in the tail cone area of this airplane so that recovery could be effected from an uncontrollable spin condition.

On the morning of August 7, the writer together with Mr. Hoover, Mr. Singer and Mr. Huff took off in Beech Model 95 (Travelair), N2787Y, to observe Mr. Tuttle's demonstration flight. Mr. Tuttle flew the test airplane to 10,000 feet pressure altitude and then began his demonstration. Eight spins were conducted in all and the attached data sheet for Beech 95 Flight No. 10 lists the results. Each of these spins were held for approximately one turn and recovery started as close to that point as possible. The first two spins were made with the right propeller feathered and the left one windmilling. This test was conducted to duplicate the conditions of the fatal accident referred to above as nearly as possible. The airplane spun in a normal manner and recovered in a normal manner. Mr. Tuttle's comment on the attached data sheet indicates that the left spin with the right propeller feathered was very similar to a normal power-off spin. The last two spins were made to demonstrate if the airplane would enter a spin from a stall with the rudder remaining in a neutral position. Both rudder and ailerons were held in a neutral position while full nose-up elevator was held during the spin. Recovery was effected in 1/8 turn after the elevator was neutralized and anti-spin rudder was used.

Each of the observers present considered the demonstration flight to have been successfully completed. Mr. Hoover of the CAB expressed his satisfaction with the airplane's spin characteristics and stated that he would write his report to that effect. After this discussion was concluded the official CAA verification program for type certification eligibility was planned.

SIGNATURE	TITLE	DATE
/s/ John W. Hurley	Eng. Flight Test Insp.	8/14/58

TRIP REPORT (Continued) Beech Aircraft Corporation, Wichita, Kansas

J. W. Hurley, Eng. Flight Test Inspector

In preparation of our check of compliance with the spin characteristics requirements of CAR 3 for a Normal Category airplane the test airplane was loaded to the most rearward CG and max. T.C. weight. This loading is explained on pages 8 and 9 of Beech Weight Control Report No. 1185, which is included as Appendix A to the attached TIR.

On August 8 the writer accompanied Mr. Steve Tuttle, Beech Test Pilot, in TD 127, the Model 95 test airplane, to conduct official CAA spin tests. This test flight started at 9:00 a.m. and each of the spins were started at approximately 12,000 feet pressure altitude. Fourteen one-turn spins were made on this flight which lasted 1.3 hours and the results were considered to be satisfactory. The airplane was demonstrated to comply with all of the spin requirements of CAR 3.124(a) for a Normal Category airplane. Evidence to this effect is contained in the attached partial TIR.

Also included in this TIR for the Beech Model 95 is data concerning the one engine inoperative stall characteristics. This data was obtained by the writer later on the same date when a second test flight was conducted at approximately 3:30 p.m. The test airplane has exceptionally good single-engine stall characteristics. In my opinion, these single-engine stall characteristics meet all of the pertinent requirements of CAR 3. Approval is recommended for the Beech Model 95, both for Normal Category spins and single-engine stall characteristics.

Attachment
cc: W-235
FW-235

/s/ John W. Hurley

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/s/ John W. Hurley

CIVIL AIR REGULATIONS READ TO JURY PURSUANT TO NEGLIGENCE PER SE INSTRUCTION

Section 3.85 of the Civil Air Regulations in force and effect at the time the aircraft involved in the accident which is the subject matter of this litigation was type certificated reads in part as follows:

> "Climb. . . (b) Climb with inoperative engine. All multiengine airplanes having a stalling speed V_{so} greater than 70 miles per hour . . . shall have a steady rate of climb of at least 0.02 V_{so}^2. In feet per minute at an altitude of 5,000 feet with the critical engine inoperative and: (1) the remaining engines operating at not more than maximum continuous power, (2) The inoperative propeller in the minimum drag position, (3) landing gear retracted, (4) wing flaps in the most favorable position, (5) cowl flaps in the position used in cooling tests as specified in Sections 3.581-3.596."

Section 3.106 of the Civil Air Regulations in force and effect at the time the aircraft involved in the accident which is the subject matter of this litigation was type certificated reads in part as follows:

> ". . . The airplane shall be satisfactorily controllable and maneuverable during takeoff, climb, level flight, dive, and landing with or without power. It shall be possible to make a smooth transition from one flight condition to another, including turns and slips, without requiring an exceptional degree of skill, alertness, or strength on the part of the pilot, and without danger of exceeding the limit load factor under all conditions of operation probable for the type, including for multiengine airplanes those conditions normally encountered in the event of sudden failure of any engine."

Section 3.120 of the Civil Air Regulations in force and effect at the time of the aircraft involved in the accident which is the subject matter of this litigation was type certificated reads in part as follows:

"Stalling demonstration. (a) Stalls shall be demonstrated under two conditions: (1) with power off, and (2) . . . with ninety percent of maximum continuous power for airplanes of 6,000 pounds or less maximum weight. (b) In either condition required by Paragraph (a) of this section it shall be possible, with flaps and landing gear in any position, with center of gravity in the position least favorable for recovery, and with appropriate airplane weights, to show compliance with the applicable requirements of Paragraphs (c) through (f) of this section. (c) For airplanes having controlled rolling and directional controls, it shall be possible to produce and correct roll by unreversed use of the rolling control and to produce and correct yaw by reversed use of the directional control up until the time the airplane pitches in a manner prescribed in Paragraph (g) of this section . . . (e) During the recovery portion of the maneuver, it shall be possible to prevent more than fifteen degrees roll or yaw by the normal use of controls and any loss of altitude in excess of one hundred feet or any pitch in excess of thirty degrees below level shall be entered in the Airplane Flight Manual. . . (g) In demonstrating the qualities required by Paragraphs (c) through (f) of this section the procedures set forth in Subparagraphs (1) and (2) of this Paragraph shall be followed. (1) With trim controls adjusted for straight flight at a speed of approximately 1.5 V_{s1} for airplanes of 6,000 pounds or less maximum weight, the speed shall be reduced by means of the elevator control until the speed is slightly above the stalling speed; then (2) the elevator control shall be pulled back at a rate such that the airplane speed reduction does not exceed one mile per hour per sec-

ond until a stall is produced as evidence by an uncontrollable downward pitching motion of the airplane, or until the control reaches the stop. Normal use of the elevator control for recovery shall be allowed after such pitching motion has unmistakeably developed."

§ 3.123 One-engine-inoperative stall. Multiengine airplanes shall not display any undue spinning tendency and shall be safely recoverable without applying power to the inoperative engine when stalled with:

(a) The critical engine inoperative.

(b) Flaps and landing gear retracted.

(c) The remaining engine operating at up to 75 percent of maximum continuous power, except that the power need not be greater than that at which the use of maximum control travel holds the wings laterally level in approaching the stall. The operating engines may be throttled back during the recovery from the stall.

§ 3.124 Spinning - (a) Category N. All airplanes of 4,000 or less maximum weight shall recover from a one-turn spin with the controls applied normally for recovery in not more than one additional turn and without exceeding either the limiting air speed or the limit positive maneuvering load factor for the airplane. In addition, there shall be no excessive back pressure either during the spin or in the recovery. It shall not be possible to obtain uncontrollable spins by means of any possible use of the controls. Compliance with these requirements shall be demonstrated at any permissible combination of weight and center of gravity positions obtainable with all or any part of the designed useful load. All airplanes in category N, regardless of weight, shall be placarded against spins or demonstrated to be "characteristically incapable of spinning" in which case they shall be so designed. (See paragraph (d) of this section.)

Identification of Petitioner's Parent, Subsidiary and Affiliated Companies:

Parent Company: Raytheon Co.

APR 16 1985

No. 84-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BEECH AIRCRAFT CORPORATION,
Petitioner,

vs.

DORIS ELSWORTH, MILDRED BEST, SANDRA DUNAWAY, and JO ANN MIRO,
Respondents.

BRIEF OF THE BOEING COMPANY, CESSNA AIRCRAFT COMPANY, GULFSTREAM AEROSPACE CORPORATION, LOCKHEED CORPORATION, McDONNELL DOUGLAS CORPORATION AND PIPER AIRCRAFT CORPORATION AS AMICI CURIAE IN SUPPORT OF THE PETITION OF BEECH AIRCRAFT CORPORATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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April 15, 1985

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No. 84-1471

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

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MOTION OF AMICI CURIAE FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

The Boeing Company, Cessna Aircraft Company, Gulfstream Aerospace Corporation, Lockheed Corporation, McDonnell Douglas Corporation and Piper Aircraft Corporation hereby respectfully move for leave to file the attached brief as amici curiae in support of the petition of Beech Aircraft Corporation for writ of certiorari to the Supreme Court of California in this case. The interest of amici curiae in this case arises from their business as manufacturers of commercial and private aircraft and related equipment. Amici curiae have requested consent to the filing of this brief from the parties to this action. Petitioner has given its consent, but respondents have refused consent.

In the Federal Aviation Act of 1958, 49 U.S.C. § 1421(a)(1), Congress directed the Secretary of Transportation to establish uniform, minimum standards for aircraft design, materials, workmanship, construction, and performance. Congress also established an agency certification process to permit the FAA to verify compliance with these standards prior to the manufacture and operation of aircraft. In the instant case, however, the California Supreme Court concluded that a trial court may make its own independent determination as to whether a par-

ticular aircraft complies with these standards and may predicate a finding of negligence *per se* on a judge's or jury's own interpretation and application of these standards. If this decision is permitted to stand, it will emasculate the uniform federal standards set by Congress and the Federal Aviation Administration concerning the certification of aircraft and will subject the petitioner and amici curiae to widely varying and conflicting standards governing the certification of aircraft. The decision also violates Congress' intent to vest primary jurisdiction over the interpretation and application of uniform federal standards for the certification of aircraft in the Federal Aviation Administration. Finally, the decision will result in the review of federal administrative decisions and regulations by state and federal courts in future aviation accident cases, in violation of § 1486 of the Federal Aviation Act.

The brief which amici curiae request permission to file addresses important issues raised by the Court's decisions in *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615 (1984) and *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, ____ U.S. ____, 104 S.Ct. 2755 (1984) but never previously decided by the Court. For the reasons stated above, the views of amici curiae expressed in the attached brief are worthy of the Court's consideration in deciding whether to grant the petition of Beech Aircraft Corporation for writ of certiorari.

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DORIS ELSWORTH, MILDRED BEST, SANDRA DUNAWAY, and JO ANN MIRO,
Respondents.

BRIEF OF THE BOEING COMPANY, CESSNA AIRCRAFT COMPANY, GULFSTREAM AEROSPACE CORPORATION, LOCKHEED CORPORATION, McDONNELL DOUGLAS CORPORATION AND PIPER AIRCRAFT CORPORATION AS AMICI CURIAE IN SUPPORT OF THE PETITION OF BEECH AIRCRAFT CORPORATION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PRELIMINARY STATEMENT

This matter presents important issues not previously addressed by this Court concerning the relationship between the principles set forth in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, ____ U.S. ____, 104 S. Ct. 2755 (1984) and *Silkwood v. Kerr McGee Corp.*, ____ U.S. ____, 104 S. Ct. 615 (1984). Respondents are the heirs of the pilot and three passengers who died in the 1974 crash of a Travel Air twin engine airplane manufactured by petitioner Beech Aircraft Corporation. The principal issue presented is the following:

May the states and the federal trial courts sitting in diversity cases conduct their own independent review of discretionary air-

worthiness standards published by the Federal Aviation Administration ("FAA") and hold the manufacturer of an aircraft liable for a violation thereof, even though the FAA has determined that the aircraft meets all FAA certification requirements and has issued a certificate to that effect?

INTEREST OF THE AMICI CURIAE

The amici curiae submitting this brief are manufacturers of commercial and private aircraft and related equipment. The Supreme Court of the State of California in this case held that the doctrine of negligence *per se* may be applied to hold such manufacturers liable for a violation of the FAA's discretionary airworthiness standards, even though the FAA has certified the aircraft in question as meeting federal safety requirements. The effect of this decision is to permit state and federal trial courts to review the decision of the FAA to certify aircraft and decide for the FAA how its airworthiness standards must be interpreted and applied in connection with the certification of aircraft.

The decision of the California Supreme Court is of major consequence to the aerospace industry. Under the Federal Aviation Act of 1958, 49 U.S.C. §1301 *et seq.*, an elaborate system of uniform, federal regulation has been established to regulate the design and manufacture of civilian aircraft. Extremely technical and complex judgments concerning these design and manufacturing processes have been entrusted by Congress to the Federal Aviation Administration. Exhaustive design reviews, inspections and testing are conducted by the FAA and its designated representatives prior to the manufacture of any new aircraft. The FAA has published a number of guidelines, referred to as airworthiness standards, which it considers in the process of certifying a new aircraft design. Many of these standards are highly technical. (Typical examples are the standards pertaining to transport aircraft structures, 14 C.F.R. §§ 25.301-25.581, which have been lodged with the Court.)

However, these airworthiness standards are not intended to serve as the definitive criteria for aircraft design and are subject to the expert interpretation of the FAA. To preserve flexibility, the FAA retains discretion to depart from these standards or to supplement them with additional requirements.

When the FAA has been satisfied that an aircraft meets an appropriate level of safety, whether or not in strict compliance with the airworthiness standards, the FAA issues a type certificate approving the aircraft design. A production certificate may subsequently be issued for the manufacture of duplicate aircraft. Finally, at the conclusion of the development process, an airworthiness certificate is issued if the FAA finds that the particular aircraft in question conforms to the type certificate and is in a condition for safe operation.

Respondents in the case at bar argued that the aircraft in question was unlawfully certified by the FAA, because it allegedly failed to meet five airworthiness standards read to the jury at the close of the trial. Permitting this type of *ad hoc*, piecemeal, independent and *de novo* review by courts and juries when the FAA has already certified the aircraft in question will introduce conflicts and uncertainty as to the governing standards for aircraft certification and inevitably undermine the integrity of the process.

The result will be a court-by-court review of FAA certification policy, resulting in considerable confusion in an area in which Congress intended to maintain a uniform, federal standard. It has the potential to impair rather than advance aircraft safety, because it will undermine uniformity in design standards and will produce a more complicated, less efficient and more expensive process of aircraft certification.

The decision below is in conflict with this Court's recent decision in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, ____ U.S. ____, 104 S. Ct. 2755 (1984), and represents a wholesale shifting to the manufacturer

of the federal liability for certification decisions that was held barred in that case. The decision also misconstrues the Court's recent decision in *Silkwood v. Kerr McGee Corp.*, ____ U.S. ____, 104 S. Ct. 615 (1984), and conflicts with recent decisions of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the District of Columbia on the use of Federal Aviation Regulations to support a theory of negligence *per se*.

REASONS WHY THE WRIT SHOULD BE GRANTED

I. The Determination By The FAA That The Aircraft Complied With Applicable FAA Regulations Preempts Adjudication Of The Identical Issue In Personal Injury And Wrongful Death Litigation

This Court has recognized four grounds for finding that federal law preempts state law in the same field:

> [1] The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.... Or [2] the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject.... Likewise, [3] the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.... Or [4] the state policy may produce a result inconsistent with the objective of the federal statute.

Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). *Accord, Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 203-05 (1983); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 158 (1982); *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 633 (1973). There can be little doubt that

federal regulation of aircraft certification meets all of the foregoing criteria and thereby preempts state activity in this field.[1]

A. The Scheme of Federal Regulation is so Pervasive as to Preclude State Action

The Federal Aviation Act of 1958 (the "Act"), 49 U.S.C. §1301 *et seq.*, vested plenary authority to regulate the design and manufacture of commercial and private aircraft in the Federal Aviation Administration (the "FAA"). Section 601 of the Act, codified at 49 U.S.C. § 1421, empowers the Administrator "to promote safety of flight of civil aircraft in air commerce by prescribing and revising from time to time ... [s]uch minimum standards governing the design, materials, workmanship, construction, and performance of aircraft, aircraft engines, and propellers as may be required in the interest of safety ..."

The House Report on the Act clearly expresses this congressional intent:

> The new Federal Aviation Agency would be headed by a civilian Administrator with plenary authority to ... (d) [m]ake and enforce safety regulations governing the design and operation of civil aircraft.

H.R. Rep. No. 2360, 85th Cong., 2d Sess., *reprinted in* 1958 U.S. Code Cong. & Ad. News 3741, 3741-42 (hereinafter "House Report"). The legislative history emphasizes the importance of a uniform, well planned, federal system of safety regulations:

> The most carefully thought out and designed equipments alone cannot make for safety in air traffic operations. Something more than communications and intricate

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[1] In *Silkwood*, the Court indicated that the traditional preemption tests could be grouped into two basic categories, but at the same time the Court reaffirmed its earlier holdings, including *Pacific Gas*, which analyze preemption questions under the four traditional tests.

> guidance devices must be provided. There must be a well planned system, operated by qualified technicians working within the framework of rules devised to provide safety features necessary for modern-day air operations.
>
> The most careful consideration must be given in the drafting of these regulations. An understanding of the system sought to be achieved and a knowledge of the problems faced at the operations level are necessary if the regulations are to accomplish their purpose.

House Report at 3746-47.

This Court has long recognized the pervasive nature of federal regulation in the field of aviation:

> Federal control is intensive and exclusive. Planes do not wander about in the sky like vagrant clouds. They move only by federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands. The moment a ship taxis onto a runway it is caught up in an elaborate and detailed system of controls.

City of Burbank v. Lockheed Air Terminal, 411 U.S. 624, 633-34 (1973), quoting *Northwest Airlines v. Minnesota,* 322 U.S. 292, 303 (1944) (Jackson, J., concurring). "As originally enacted, the...Act vested...all regulatory authority over aviation safety" in the FAA. *Varig,* 104 S.Ct. at 2760 n.5.

Although the Federal Aviation Act preserves existing state remedies, 49 U.S.C. § 1506,[2] the Court has held that language

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[2] The California Supreme Court relied on 49 U.S.C. §1506 for its holding that Congress had not occupied the field of aircraft regulation. At the same time, however, the court conceded that federal law "may have completely occupied the field of regulation of aircraft safety and certification." 37 Cal. 3d at 549. Indeed it has. Moreover, it is important to note that consistent with the dictates of § 1506, respondents' state law remedies will in no way be cut off by reversal of the decision below. Plaintiffs would still be able to recover compensatory damages for negligence or product defects.

like that in §1506 cannot be permitted to undermine the uniformity that Congress intends to achieve with federal regulation. *Texas & Pacific Railway v. Abilene Cotton Oil Co.*, 204 U.S. 426, 446 (1907).

This Court has indicated that state action motivated by safety concerns is preempted when the federal government has occupied the field of safety regulation in a particular industry. *Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 212-13 (1983)(upholding regulation motivated by economic concerns). In this case, the California Supreme Court conceded in its opinion that it was acting out of a concern for safety.[3] Such state action unquestionably has been preempted under the reasoning of *Pacific Gas.*[4]

B. The Federal Interest in Aircraft Certification is so Dominant as to Preclude State Action

The California Supreme Court's decision in this case totally ignores that a "dominant federal interest" may serve as a basis for preemption, *see* 37 Cal. 3d at 548, even though this test has been firmly established by the Court. Even a brief examination of the relevant interests reveals that the design, manufacture, testing and certification of aircraft are of nationwide concern. Congress recognized this inherent feature of aviation in the Federal Aviation Act when it called for a well planned, federal system of aircraft certification and safety regulation. As this

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[3] The court's motivation is unmistakable: "An inquiry in a state court into ... the requirements of the safety regulations, would assist the FAA in policing a manufacturer's compliance...." 37 Cal. 3d at 551. "A state court investigation ... promotes the safety of the traveling public." *Id.*

[4] As discussed *infra* in part I.D., this result is unaffected by the Court's recent holding in *Silkwood v. Kerr-McGee Corp.*, ____ U.S. ____, 104 S.Ct. 615 (1984).

Court's holdings have consistently recognized, planes are manufactured and operated by "federal permission, subject to federal inspection, in the hands of federally certified personnel and under an intricate system of federal commands." *Lockheed Air Terminal,* 411 U.S. at 634; *Northwest Airlines,* 322 U.S. at 303. Moreover, the same federal interest dominates the regulation of aircraft design and manufacture:

> The interest of the federal government in regulating the design and manufacture of aircraft is just as intensive, pervasive, exclusive and great as its interest in regulating the "affairs of the nation's airways." ... The preemption by the federal government of the entire field of aviation is illustrated in ... *Lockheed Air Terminal* ... and *Northwest Airlines* ....

In re Paris Air Crash of March 3, 1974, 399 F. Supp. 732, 747 (C.D. Cal. 1975). *Accord, Kohr v. Allegheny Airlines, Inc.,* 504 F.2d 400, 403-04 (7th Cir. 1974), *cert. denied,* 421 U.S. 978 (1975).

The exclusive federal control of aircraft certification also extends to post-accident design changes. In the event of an accident, the federal scheme provides for the issuance of safety recommendations to the FAA by the National Transportation Safety Board. 49 U.S.C. § 1441(a)(3). The FAA may either accept or reject these recommendations based on its own review of the relevant safety considerations. 49 U.S.C. § 1906. This two-tier federal scheme is no mere formality. In the legislative history to the Independent Safety Board Act of 1981 Congress recognized "that it is not likely that every safety suggestion made by the Board will be accepted...." H.R. Rep. 97-108, 97th Cong., 1st Sess., *reprinted in* 1981 U.S. Code Cong. & Ad. News 1729, 1731. Policy judgments concerning certification and safety regulation are dominated by the same federal interest whether they arise in the manufacturing process or in the event of an aviation accident.

C. The Objects Sought by the Federal Law Preclude State Action

It is apparent that one of the primary objects sought by Congress in the Federal Aviation Act was a uniform, well planned, federal system of aircraft certification and safety regulation. House Report at 3746-47; *see* discussion in Part I.A, *supra*. To achieve this objective, Congress vested plenary authority for aircraft certification and safety regulation in the FAA. House Report at 3741-42. Congress, in addition, limited review of FAA decisions to a well defined administrative process. *See* 49 U.S.C. §§ 1481 *et seq*. The regulatory scheme which Congress put in place clearly manifests its intent to accomplish these goals through preemptive regulation. The decision below ignores and clearly subverts that intent.

D. Reconsideration of FAA Certification in Trial Courts is Preempted Because it Produces Results Inconsistent with Federal Objectives

One of the most disturbing aspects of the decision below is the conflict it creates between the certification standards established by the FAA and what amounts to a state standard for aircraft certification.

The question of aircraft certification was intended to be the exclusive province of the FAA. The California Supreme Court, nonetheless, endorsed a process whereby every trial court may review, reverse and contradict the FAA. The relitigation of aircraft certification and safety regulation by the state courts or federal courts sitting in diversity actually threatens to undermine safety—one of the primary objects of the entire certification process. There is good reason to conclude that safety would be best enhanced by uniformity. Standardization of aircraft designs promotes quality control and ease of maintenance and operation. Congress recognized these benefits when it decided to vest plenary authority over certification in the FAA. House Report at 3746-47. Congress also recognized the impor-

tance of uniform, coordinated post-accident regulation of aircraft design changes by providing for the review of the NTSB's recommended design changes by the FAA prior to implementation. *See* 49 U.S.C. § 1906.

The California Supreme Court's decision promises to replace this uniform, federal scheme mandated by Congress with a patchwork of conflicting state standards. "[U]nless all courts reached an identical conclusion a uniform standard . . . would be impossible." *Abilene,* 204 U.S. at 440. If the decision stands, judges and juries will be free to interpret the Federal Aviation Act and the Federal Aviation Regulations for themselves and decide whether aircraft certified by the FAA should have been certified. The best proof of this danger is respondent's own closing argument at the trial of this case:

> [T]his airplane is uncertifiable. It was uncertifiable then and it is uncertifiable now.
>
> This airplane could not have legally been built then; it couldn't legally have been built now. . . .
>
> But what about the FAA? What about the CAA, the people charged by the Congress of the United States to protect us from manufacturing errors and mistakes and from bad airplanes? What about the CAA? They approved this thing.
>
> Well, that may have sounded good before we started, but I hope it doesn't sound good any more, because the people in whom the people of the United States through the Congress of the United States have placed their trust don't do their job. . . .

See Appellant's Opening Brief in the Court of Appeal of the State of California at 13, 19, 2nd Civil No. 63299 (June 18, 1982). With the blessing of the trial court, these arguments were made in the face of FAA certification of the aircraft. The jury plainly was invited to reconsider for itself whether the FAA could legally certify the plane, notwithstanding Congress' un-

mistakable intent that decisions on the certification of aircraft are to be an exclusive, discretionary function of the FAA.[5]

In *Varig Airlines,* the Court expressed concern about judicial second-guessing of FAA decisions in tort actions:

> [W]hatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the Government in its role as a regulator of the conduct of private individuals....Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort.

104 S. Ct. at 2765. The case at bar involves the same type of "second-guessing" and is squarely at odds with the regulatory scheme enacted by Congress, implemented by the FAA and interpreted by this Court in *Varig.*

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[5] The ramifications of this decision would extend to all industries in which products are certified by federal agencies in the interest of safety. This would include, *inter alia,* certification of pesticides and agricultural products by the Department of Agriculture under 7 U.S.C. §§ 136a, 136b, 243, 1380a and 2259; certification testing for compliance of consumer products with safety standards prescribed by the Consumer Product Safety Commission under 15 U.S.C. § 2063(b); certification of drugs and food additives by the Food and Drug Administration under 21 U.S.C. §§ 356, 357, 360b and 376; certification and licensing of offshore mining facilities by the National Oceanic and Atmospheric Administration under 30 U.S.C. § 1413; certification of marine sanitation devices by the Environmental Protection Agency under 33 U.S.C. § 1322; certification of electronic products for radiation emissions by the Department of Health and Human Services under 42 U.S.C. § 263f; certification of nursing facilities by the Department of Health and Human Services under 42 U.S.C. § 1396a; and certification of compliance of motor vehicles with emission standards by the Department of Health and Human Services under 42 U.S.C. § 1857f-5. Under the reasoning of the California Supreme Court, trial courts in cases involving any of these products could second-guess the federal agencies' judgment and hold that the product in question was unlawfully certified.

It is impossible to imagine how individual manufacturers will contend with the conflicts created by this decision. If a court finds that one model of an aircraft fails to meet its own interpretation of some FAA regulation, a manufacturer will be confronted with a dilemma. Must it ask the FAA to recertify the aircraft? What is it to do with regard to similar model aircraft, of which there may be hundreds or thousands? What will the implications be if some manufacturers take such action and others do not? Economic and competitive factors in the industry would further complicate the manufacturers' efforts to formulate a response. Moreover, if a manufacturer requests recertification, it is entirely unclear how the FAA should respond to such a request.

The decision poses an equally serious dilemma for commercial and private aircraft operators. If a court in a civil damage action decides an aircraft was improperly certified, serious legal uncertainty attaches to all operators of that aircraft who continue to operate it. Could a state court subsequently find the operator liable under common law theories of negligence for operating an improperly certified aircraft? Potential liability should another accident occur could be staggering. On the other hand, should an entire fleet be grounded on the basis of *ad hoc* decisions by lay judges and jurors? The economic implications of such decisions for the troubled airline industry would be enormous. These are the types of potential problems that mandate a uniform federal policy of aircraft certification and safety regulation, and this policy will be frustrated if the decision below stands.

Preemption is not avoided simply because plaintiffs seek monetary compensation for damages sustained in an aviation accident. This Court has recently stated that it will not permit the states "to use the threat of damages to require...exactly what [an agency] is empowered to excuse." *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981). In the case at bar, as in *Kalo Brick*, the findings by the agency, "made pursuant to the authority delegated by

Congress, simply leave no room for further litigation over the matters respondent seeks to raise in state court." 450 U.S. at 327. As the Court indicated in *Kalo Brick,* federal law preempts "common-law causes of action for damages stemming from... negligence and tort ...hen the judgments...necessary to the decision have already been made" by the federal agency. 450 U.S. at 327. The critical aspect of the case at bar is not that respondents seek to recover on a negligence theory or a theory of strict liability, but that they invoke a theory that directly attacks the FAA's decision to certify the aircraft.

In this respect, the decision of the California Supreme Court represents a misconstruction of the Court's recent decision in *Silkwood v. Kerr-McGee Corp.,* ____ U.S. ____, 104 S.Ct. 615 (1984). In *Silkwood,* this Court ruled that state court claims for punitive damages based on tortious conduct of companies regulated by the Nuclear Regulatory Commission were not preempted by the federal regulatory scheme. 104 S.Ct. at 626. However, the Court acknowledged in *Silkwood* that state law theories of tort recovery would be preempted if they come into "irreconcilable conflict" with the federal standard or "would frustrate the objectives of the federal law." 104 S. Ct. at 626.

Although the California Supreme Court acknowledged these limitations on the scope of *Silkwood,* the court's decision completely disregards and undermines them. This case presents an irreconcilable conflict between the FAA and the State of California. A claim based upon a theory of negligence *per se,* unlike the claim for punitive damages in *Silkwood,* required the state court to set aside the FAA's decision on certification of the aircraft and substitute its own interpretation of the governing federal regulations. The interpretation adopted by the state court is in direct conflict with the FAA's interpretation and must, therefore, bow to federal preemption under the FAA regulatory scheme.

The California Supreme Court's decision is also at odds with the federal case of *Fisher v. Bell Helicopter Co.,* 403 F. Supp.

1165 (D.D.C. 1975). *Fisher*, like the instant case, presented, *inter alia*, a claim of negligence *per se* based on violations of airworthiness standards established by the FAA. In *Fisher*, the FAA decided to continue certification of a helicopter for a grace period of fifty hours, although it had determined that certain bolts on the helicopter needed to be replaced in the interest of safety. The District Court for the District of Columbia held that the FAA's decision to continue certification precluded a finding of negligence *per se* based on the failure of the bolts to meet FAA airworthiness standards. 403 F. Supp. at 1174.

II. The Court Below Erred In Interpreting Federal Law

The decision below also threatens to undermine FAA policy by distorting the FAA's regulations governing certification. The court below misinterpreted those regulations by assuming that they establish mandatory design criteria for the manufacturer.[6] In fact, they establish only discretionary guidelines for the FAA.

Under the Federal Aviation Act, the FAA certifies aircraft based on a discretionary judgment of the aircraft's safety. 49 U.S.C. § 1423(2). Pursuant to the Act, the FAA has adopted a large number of "airworthiness standards" that the FAA itself may apply in determining whether to certify a particular aircraft,[7] but the FAA retains authority to grant or deny certification on the basis of safety standards different from or in addition to these. The applicable regulations provide expressly that the airworthiness standards published in FAR Parts 23-29 are

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[6] By statute, the California doctrine of negligence *per se* applies only if a person, *inter alia*, "violate[s] a statute, ordinance, or regulation of a public entity." Cal. Evid. Code § 669(a) (West Supp. 1985).

[7] The current guidelines for various types of airplanes appear in the Federal Aviation Regulations ("FAR"), Parts 23-29, 14 C.F.R. §§ 23-29, formerly the Civil Aeronautics Regulations ("CAR"), Parts 3, 4b, 6 and 7.

only one alternative means of qualifying an aircraft for certification. The FAA will also certify the aircraft if "any airworthiness provisions not complied with are compensated for by factors that provide an equivalent level of safety." 14 C.F.R. § 21.21(b)(1). Conversely, the regulations provide that the Administrator may impose "special conditions" above and beyond what is contained in the airworthiness standards. 14 C.F.R. § 21.21(b).

While manufacturers design to these standards, they serve merely as guidelines to the FAA and do not impose any legal duties on the manufacturer. It is the FAA, not the manufacturer, that decides whether an aircraft should be certified. A failure of an aircraft design to meet these standards, although it may result in a denial of certification, does not involve the violation of any legal duty imposed on the manufacturer.

Consistent with their status as guidelines, the FAA's airworthiness standards are not the subject of any of the prohibitions established in the Act. The Act's prohibitions relate solely to the violation of the terms of FAA production certificates or the operation of aircraft that have not been properly certified. 49 U.S.C. § 1430(a). Moreover, this Court recently acknowledged in the *Varig Airlines* case that the FAA's certification procedures are discretionary in nature and are protected by the "discretionary function" exception to the Federal Tort Claims Act.[9]

By permitting a finding of negligence *per se* based on airworthiness standards, the decision below conflicts with the reasoning of the sixth circuit in *Rimer v. Rockwell International*

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[9] Although the *Varig* case addressed specifically the FAA's decision to use a "spot-check" program to monitor compliance with its regulations, the case has subsequently been interpreted to be "wholly applicable" to more general claims of negligent inspection and certification by the FAA. *Natural Gas Pipeline Co. of America v. United States*, 742 F.2d 502, 504 (9th Cir. 1984).

Corp., 641 F.2d 450 (6th Cir. 1981). There the court held that provisions in the Federal Aviation Regulations that do not impose "specific duties" cannot serve as a basis for a finding of negligence *per se*. 641 F.2d at 454-55. Under this test, the airworthiness standards in this case could not have served as a basis for a finding of negligence *per se*, because they do not impose any "specific duties" on the manufacturer. The California Supreme Court ignored the discretionary nature of those standards and presumed some legal duty on the manufacturer to comply with them. The Court should grant the petition in order to correct this error of federal law which distorts the FAA certification scheme.

III. The Doctrine Of Primary Jurisdiction Requires Trial Courts To Defer To The FAA For A Decision On Allegations That An Aircraft Does Not Comply With FAA Regulations

Respondent's negligence *per se* theory in this case is predicated on allegations that the aircraft in question was improperly certified. However, respondent made no effort to bring these allegations before the FAA for agency decision prior to asserting them in court. For this reason, the procedure sanctioned by the California Supreme Court in this case violates the principle of primary jurisdiction, under which courts are required to defer to administrative agencies on matters which fall within their special expertise. *Weinberger v. Bentex Pharmaceuticals, Inc.*, 412 U.S. 645 (1973); *Pennsylvania Railroad v. United States*, 363 U.S. 202 (1960); *Far East Conference v. United States*, 342 U.S. 570 (1952). The decision below threatens to clog and complicate aviation accident cases with administrative certification questions that Congress intended to be directed to the FAA. It also undermines the uniformity and consistency that Congress hoped to achieve by vesting primary jurisdiction over air safety in the FAA. House Report at 3746-47.

The doctrine of primary jurisdiction applies with equal force to issues committed to agency decisionmaking, "even though the facts after they have been appraised by the specialized competence serve as a premise for legal consequences to be judicially defined." *Far Eastern Conference v. United States,* 342 U.S. 570, 574-75 (1952), quoted in *Bentex Pharmaceuticals,* 412 U.S. at 654. The Court reaffirmed this principle in *United States v. Western Pacific Railroad,* 352 U.S. 59 (1956). There, the Court formulated the following general rule:

> "Primary jurisdiction"...applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

352 U.S. at 63-64. *See also General American Tank Car Corp. v. El Dorado Terminal Co.,* 308 U.S. 422, 433 (1940).

In the instant case, respondent has used alleged violations of FAA certification guidelines as a premise for a legal finding of negligence *per se.* The decision below authorizes tort plaintiffs in this and future cases to do an end run around federal procedures governing product certification. In this case, statutory procedures were readily available to respondents for a proper, administrative determination of the certification issue. The Federal Aviation Act provides that the FAA may at any time reconsider the certification of aircraft and revoke existing certificates in response to a complaint filed by "[a]ny person." 49 U.S.C. §§1429, 1482(a). The Court should grant the writ and hold that the proper procedure for resolving respondents' allegations about certification of this aircraft was to file a complaint with the FAA.

IV. The Federal Aviation Act Of 1958 Precludes Review Of FAA Aircraft Certification By Trial Courts

Even if the FAA had denied respondents' allegations and declined to find improper certification, it was nonetheless erroneous for the trial court to entertain respondents' challenge to the certification of the aircraft, because Congress has vested exclusive jurisdiction over the review of FAA certification decisions in the federal courts of appeals.

In connection with the delegation of authority to an administrative agency, Congress may specify a particular forum for the judicial review of agency action, and the courts must enforce that choice. *City of Tacoma v. Taxpayers,* 357 U.S. 320, 336 (1958). In the Federal Aviation Act, Congress chose to vest jurisdiction over challenges to an FAA "order" in the United States courts of appeals. 49 U.S.C. § 1486(a). This provision establishes that Congress did not intend trial courts to review the FAA's orders. Moreover, the federal courts have consistently respected the exclusive jurisdiction established in §1486(a). *New York v. Federal Aviation Administration,* 712 F.2d 806 (2d Cir. 1983); *Nevada Airlines v. Bond,* 622 F.2d 1017 (9th Cir. 1980); *Sima Products Corp. v. McLucas,* 612 F.2d 309 (7th Cir.), *cert. denied,* 446 U.S. 908 (1980); *City of Rochester v. Bond,* 603 F.2d 927 (D.C. Cir. 1979).

The certification of the aircraft in this case constituted an "order" within the meaning of § 1486(a).[9] The administrative record supporting certification decisions is extensive, including manufacturers' design and performance data and results of

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[9] Under the Administrative Procedure Act, "order" includes "the final disposition...in a matter other than rule making but including licensing." 5 U.S.C. §551(6). A "license" includes "an agency permit, certificate, approval...or other form of permission." *Id.* § 551(8). Accordingly, FAA certifications have been held to be "orders" reviewable in the courts of appeals under § 1486(a). *O'Donnell v. Bond,* 510 F. Supp. 925 (D.D.C. 1981).

numerous tests and analyses conducted by the FAA.[10] *See* 49 U.S.C. § 1423. This record has been held adequate to allow complete judicial review. *O'Donnell,* 510 F. Supp. at 930. The courts have indicated that statutorily ordered methods of review may be held inappropriate only in extreme instances. *Nader v. Volpe,* 466 F.2d 261, 266 (D.C. Cir. 1972). There is no basis here for making an exception to the rule that only the federal courts of appeals are authorized to review FAA certification decisions.

Respondents in this case have completely ignored the procedures provided in § 1486. Faced with the FAA's official determination that the aircraft complied with all applicable FAA regulations and was qualified for FAA certification, they sought what amounts to a *de novo* review of this FAA decision in a tort action in the state courts of California. Although respondents seek money damages in the case at bar, their claims and the court's findings are based on a theory of negligence *per se* that looks behind the FAA's certification of the aircraft and reviews whether that certification was proper, *i.e.,* whether the aircraft in question complied with all certification requirements at the time of certification. The decision of the California Supreme Court in this case conflicts with the consistent interpretation of § 1486 by the federal courts, and subverts the congressional scheme limiting review of FAA certification to the U. S. courts of appeals.

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[10] In *Varig,* the Court acknowledged one manufacturer's estimate that the certification process may require the production of some "300,000 engineering drawings and changes, 2,000 engineering reports, and 200 other reports." 104 S.Ct. at 2761 n.7.

CONCLUSION

For the reasons stated, this Court should grant the petition for writ of certiorari, reverse the opinion of the California Supreme Court and reinstate the opinion of the California Court of Appeal.

Respectfully submitted,

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(3)

No. 84-1471

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1984

BEECH AIRCRAFT CORPORATION,
Petitioner,
VS.
DORIS ELSWORTH, et al., MILDRED BEST, et al.,
SANDRA DUNAWAY, et al., and JO ANN MIRO, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTION PRESENTED FOR REVIEW

Can the petitioning aircraft manufacturer assert "the preemption doctrine" to avoid paying the responding pilot's and passengers' heirs' judgment for wrongful death damages unanimously affirmed en banc by the California Supreme Court where the judgment was entered on a general jury verdict based on five different theories of products liability including a negligent design theory using a negligence per se jury instruction authorized by a state statute and supported by five federal air safety regulations simply because sixteen years prior to the fatal aircrash the Civil Aeronautics Administration spot-checked compliance with just one of the five regulations under conditions dissimilar from those encountered by the accident aircraft?

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No. 84-1471

IN THE

Supreme Court

OF THE

United States

OCTOBER TERM, 1984

BEECH AIRCRAFT CORPORATION,
Petitioner,
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SANDRA DUNAWAY, et al., and JO ANN MIRO, et al.,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

SUMMARY

Respondents and passengers' heirs DORIS ELSWORTH, et al., MILDRED BEST, et al., and SANDRA DUNAWAY, et al., ("passengers' heirs") believe that the unanimous en banc decision of the California Supreme Court affirming their judgment for wrongful death damages should not be altered and no writ of certiorari should issue because petitioner and aircraft manufacturer BEECH AIRCRAFT CORPORATION ("Beech"), has not demonstrated "special and important reasons therefor." U.S.S. CT. Rule 17.1. Because Beech has obtained a stay of enforcement of judgment from the trial court, passengers' heirs pray that this Court end their eleven years of financial hardship by denying the unfounded petition as fast as possible.

CONSTITUTIONAL PROVISIONS APPLICABLE

In addition to U.S. CONST. Art. VI cl. 2, this case involves:

U.S. CONST. Tenth Amendment (1791)

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the State respectively, or to the people."

STATUTES INVOLVED

This case involves 49 U.S.C. §1506 (1958) which provides:

> "Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."

It also involves CAL. EVID. CODE §669 (1967) which codifies the common law doctrine of negligence per se. See, footnote 1 at 1a-2a of the petition appendix.

COUNTERSTATEMENT OF THE CASE

The Fatal Aircrash

Eleven years ago on Father's Day, June 16, 1974, pilot Edward Miro of Miro Aviation flew passengers Richard Elsworth, Robert Best and Neldon Dunaway in a Travel Air twin-engine aircraft designed and manufactured by petitioner Beech. At some point Mr. Miro turned off the left fuel selector, shut down the left engine and feathered the left propeller blades. This procedure was proper in the event of engine malfunction. Whatever his reason, feathering the propeller and shutting off the left engine did not affect the stall/spin characteristics of the aircraft under foreseeable single-engine flight. The passengers' first and

only contact with the Beech Travel Air lasted just seven minutes. All four men died when the Beech Travel Air stalled and spun to the ground in a flat spin.

The Reasons Underlying the General Verdict in Favor of the Heirs Misstated by Beech

The petition understates respondents' contentions at trial. The wives and children of the four decedents filed wrongful death actions against Beech based on five different theories of liability, *i.e.*, negligent testing, negligent design, defective design, negligent failure to warn and defective failure to warn. Respondents contended that:

a. BEECH negligently tested its Travel Air aircraft prior to manufacture of the one which crashed;

b. The Travel Air landing configuration stall speed is 71.7 mph not under 70 mph as reported by BEECH;

c. The single-engine rate of climb is minus 50 feet per minute not at least plus 102.8 feet per minute as required by Civil Air Regulation (CAR) 3.85(b) for aircraft with landing configuration stall speeds in excess of 70 mph;

d. The BEECH Owners Handbook contains no information on single-engine airspeeds at stall;

e. The BEECH Owners Handbook fails to inform the pilot at which altitudes the single-engine stall speed will be encountered before the single-engine minimum control speed;

f. BEECH Owners Handbook contains no information on single-engine minimum control speeds;

g. The stall warning light and horn do not give the pilot at least 5 and not more than 10 mph warning prior to stall as required by CAR 3.120(f);

h. The sound of the gear warning horn, which goes on when the propeller is feathered, masks the sound of the stall warning horn;

i. The BEECH Owners Handbook incorrectly states that the stall warning gives the pilot ample time to correct his attitude at all flight altitudes, weights and airspeeds;

j. The BEECH Owners Handbook incorrectly describes the single-engine flight and handling characteristics as "excellent;"

k. Once the Travel Air stalls during single-engine flight, the aircraft suddenly and abruptly rolls and yaws into a classic spin entry before the surprised pilot can avoid the spin, which undue spinning tendency violates CARs 3.123 and 3.124;

l. The BEECH Owners Handbook contains no warning concerning the single-engine stall/spin characteristics of the aircraft;

m The exceptional degree of skill and alertness required to avoid a fully developed spin and to effectuate spin recovery violates CAR 3.106; and

n. The spin recovery technique in the BEECH Owners Handbook is dangerously inaccurate, as BEECH later acknowledged.

The trial lasted four months. The jury deliberated two weeks before returning a general verdict awarding damages to all of the heirs.

Jurisdictional Defects: Beech's Failure to Preserve Issues for Review

The petition quotes misleading excerpts of respondents' counsel's closing trial argument taken out of context. At

trial Beech did not object to this argument and request that the jury be admonished. Beech thus waived any objection to those remarks. *Warner Construction Co. v. City of Los Angeles,* 2 Cal.3d 285, 302-3, 85 Cal. Rptr. 444 (1970). *See* 13a.

Beech never claimed that any of the heirs' five theories of liability were improper. Confronted with abundant evidence supporting the verdict, Beech never claimed that the verdict was not supported by substantial evidence. Beech also did not claim that the jury awarded excessive damages.

On appeal, Beech challenged only the "violation" element of BAJI 3.45, the standard negligence per se jury instruction mandated by CAL. EVID. CODE §669, originally claiming that federal "primary jurisdiction" barred its use. Because Beech did not offer an accurate alternate instruction at trial, its appeal was limited to whether giving BAJI 3.45 as applied only to the heirs' neglect design theory constituted a miscarriage of justice. CAL. CONST. ART. VI §13. In a brief before the California Supreme Court, however, Beech correctly conceded that federal regulation does not occupy the field of air safety. *See, e.g.,* 49 U.S.C. §1506. Contrary to its present petition, Beech cannot resurrect that argument before this Court. *Erie Railroad Co. v. Purdy,* 185 U.S. 148, 153-4 (1902).

Essential Facts About the Travel Air Certification Misstated by Beech Which Change the Nature of the Legal Issues

The petition presents an inaccurate and misleading history of the Travel Air certification. The evidence adduced at trial established that Beech employees tested, inspected and kept all records regarding the Travel Air under the "Delegation Option." The Civil Aeronautics Administration ("CAA") only issued the certificate. It is uncontested that Beech manufactured and certified the accident aircraft on July 24, 1958, without proper flight tests. The CAA later told Beech:

> "[I]n the request for issuance of a type certificate for the airplane, it was certified that the airplane complied with the applicable airworthiness requirements when in fact, you had not determined that it complied with this particular regulation [CAR 3.124(a)]. Under these circumstances, in so certifying, you failed to discharge the responsibility placed upon you by Part 410 of the Regulations . . . Your performance, in this case, is less than we believe reasonable to expect from a manufacturer to whom the privileges of the Delegated Option has been granted."

Absent the required testing the CAA had no authority to issue a type certificate. 14 C.F.R. §§21.231-21.293.

On August 8, 1958, after another fatal aircrash, Beech flight-tested the Travel Air for compliance with CAR 3.124(a) only, not the other 4 CARs at issue. The CAA representative flew in a chase plane where he could not observe how Beech's test pilot manipulated the aircraft controls. As the test conditions indicate, he only "spot checked" compliance with CAR 3.124(a). None of the flights tested the aircraft's ability to recover from fully developed spins (*i.e.*, two or more turns). Performed at 12,000 feet pressure altitude, none of the flights demonstrated the aircraft's performance under foreseeable true asymetric power conditions. A Beech Safety Communique later admitted:

> "If . . . the airplane is allowed to become fully stalled while one engine is providing lift-producing thrust, a rapid rolling and yawing motion may develop even against full aileron and rudder, resulting in the airplane becoming inverted during the onset of a spinning motion."

Contrary to the petition, no means existed to challenge the certification on July 24, 1958, or when Beech flight-tested the Travel Air on August 8, 1958, because 49 U.S.C.

§1486(a) did not become effective until December 31, 1958. In July of 1958, one of the passengers' heirs had not yet been conceived and another was only eight years old. Their decedents would have no contact with the aircraft until their fatal seven minute flight almost sixteen years later. Contrary to the petition, the heirs sought compensatory damages for the deaths of their decedents, not the decertification or grounding of the aircraft wreckage. Contrary to the petition, the heirs sought to complement the CAA/FAA air safety efforts not to supplant or "second-guess" them.

The Unanimous En Banc California Supreme Court Opinion Reaching A Right and Fair Result

The three judge panel of the California Court of Appeal which decided this case included one judge who admitted during oral argument that he had previously worked for the FAA. Its opinion mischaracterized the heirs' objections to the aircraft's stall/spin characteristics, ignored their failure to warn claims and misstated the laws. Its flawed opinion became a nullity once the California Supreme Court granted the heirs' petition for hearing. *Krouse v. Nimocks*, 6 Cal. 2d 482, 483, 66 P. 2d 438 (1937).

The main issue presented by the petition for hearing was: "Can a federal airsafety regulation support a negligence per se jury instruction in a California products liability action?" Sitting en banc the California Supreme Court unanimously affirmed the heirs' judgment for compensatory damages in a well-reasoned opinion authored by Justice Stanley Mosk. That opinion reached a right and fair result.

REASONS FOR DENYING THE WRIT

I.

THE CALIFORNIA SUPREME COURT'S UNANIMOUS EN BANC OPINION ALLOWING USE OF FEDERAL AIR SAFETY REGULATIONS TO SUPPORT A NEGLIGENCE PER SE JURY INSTRUCTION MANDATED BY STATE STATUTE DID NOT WRONGLY DECIDE ANY FEDERAL QUESTION.

Essentially, the California Supreme Court's unanimous en banc opinion held that a negligence per se jury instruction mandated by CAL. EVID. CODE §669 could be supported by federal air safety regulations. It is not the function of this Court to construe a state statute contrary to the construction given to it by the highest Court of the State. *O'Brien v. Skinner*, 414 U.S. 524, 531 (1974). Moreover, it is not the practice of this Court to reach out to decide constitutional issues where none exist. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

In the area of preemption "each case turns on the peculiarities and special features of the federal regulatory scheme in question." *City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 638 (1973). The Civil Aeronautics Act of 1938 and its successor, the Federal Aviation Act of 1958, explicitly provide that the administrative remedies provided by the federal scheme are not exclusive. 49 U.S.C. §1506. The 1958 Act adopts the 1938 Act verbatim. The legislative history of the 1938 Act does little to elucidate this provision. The Conference Report merely states:

> "§1010 REMEDIES NOT EXCLUSIVE. This section, Section 1104 of the Senate bill, and Section 1106 of the Conference agreement are identical."

S. REP. NO. 2635, 75th Cong., 3d Sess. 78 (1938). The House Report does not mention §1010. H.R. Rep. No. 2254,

75th Cong., 3d Sess. 11 (1938). The Senate Report does not discuss §1104. S. REP. No. 1161, 75th Cong., 3d Sess. 2 (1938). "The suggestion was made in 1938 that Federal regulation of civil aviation be exclusive. Senator McCarran, one of the authors of the Civil Aeronautics Act, said he had this in mind himself, but 'he did not want to become a revolutionary with one stroke.' Hearings on S. 3659 before Subcommittee of Senate Committee on Commerce, 75th Cong., 3d Sess., at 100 (1938)." A. F. Lowenfeld, AVIATION LAW (2d ed. 1981) §3.31 at 3-162n.a. Thus, state law has always governed aviation accidents. *Id.* §1.31. "None of this was inevitable. Compensation for aviation accidents could, for instance, have been governed by federal law, as are virtually all other aspects of commercial aviation in the United States." *Id.* at 6-7. Federal regulation does not occupy the field. *Brunwasser v. Trans World Airlines, Inc.*, 541 F. Supp. 1338, 1345 (W.D. Pa. 1982); *Ravreby v. United Airlines, Inc.*, 293 N.W. 2d 260 (Iowa 1980).

Concurrent jurisdiction is always presumed absent clear incompatibility and even if exclusive jurisdiction exists a state court will usually be allowed to decide a federal question collaterally. *Hathorn v. Lovorn*, 457 U.S. 255, 266 (1982). Beech concedes that at best the determination at issue was collateral. The CAA/FAA can only "spot check" the manufacturer's work. *United States v. S.A. Empressa de Viaco Aerea Rio Grandense*, ____ U.S. ____, 104 S. Ct. 2755, 81 L. Ed. 2d 660, 676 (1984). "[T]he duty to ensure that an aircraft conforms to FAA safety regulations lies with the manufacturer . . . ." *Id.*

> "It is essential that [those who build aircraft and component parts for general aviation] as well as aircraft operators, be ever conscious that a plane is an inherently dangerous and sensitive instrumentality which can cause harm if high standards of care are relaxed.

> The complex and exacting scheme of regulation developed by the FAA to this end must be reinforced and strengthened by courts called on to develop rules of liability and damages in situations like the instant case where it is apparent that high standards consistent with the regulatory scheme have not been maintained with resulting injury to persons and property."

Fischer v. Bell Helicopter Co., 403 F. Supp. 1165, 1174 (D.D.C. 1975).

Because Beech certified its Travel Air aircraft under the "Delegation Option" with Beech employees performing all regulatory functions except signing the certificate, no independent agency expertise is present in this case. On the facts, Beech did not even test the aircraft before requesting certification. As the court stated in *Johnson v. Steam-Gauge Lantern Co.*, 25 N.Y.S. 689, 692 (Sup. Ct. 1893): "[a] certificate could not operate to convert an obviously unsafe landing into a safe one."

Because Beech concedes that the heirs have valid negligence and strict liability causes of action and because the heirs do not seek a mandatory injunction requiring changes in the aircraft, uniformity is not at issue. Beech admits that a state court can allow damages where an aircraft manufacturer requires more than the minimum required by the CARs. Here, the heirs' use of the CARs with their negligence per se jury instruction did not interfere with the federal regulatory scheme. 49 U.S.C. §1506 specifically allows such use.

In contrast, the rule now urged by Beech hands aircraft manufacturers a complete defense to all products liability litigation. This result is particularly inappropriate because the high degree of regulatory agency control and delegated regulatory authority effectuated by these manufacturers al-

ready gives them undue insulation from responsibility for their actions. Certainly, Congress never intended such a perverse result. The unanimous en banc opinion of the California Supreme Court prevents aircraft manufacturers from using federal air safety regulations as a shield from liability rather than as a guide to safety.

II.

THE ALLEGED CONFLICTS ARE ILLUSORY

Beech concedes that no comparable decisions have been made by any state court of last resort. The alleged conflicts with decisions of this Court and federal courts of appeals are illusory.

In *Silkwood v. Kerr-McGee,* ____ U.S. ____, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984) the Nuclear Regulatory Commission investigated twice and found no violation of Atomic Energy Commission safety regulations before or after the contamination of Karen Silkwood. 104 S. Ct. 470n. 4. Yet, the *Silkwood* plaintiffs provided convincing contrary expert testimony at trial and received a jury verdict in their favor. This Court let the *Silkwood* plaintiffs recover damages based on the defendant's violation of federal standards despite extensive regulation of the nuclear power industry, finding no conflict. 104 S. Ct. 626. All nine justices agreed that the extensive federal safety regulations did not bar plaintiffs' compensatory damages. "There is no element of regulations when compensatory damages are awarded . . . ." 104 S. Ct. 469n. 3, Powell, Burger & Blackman dissent. "Whatever compensation standard a state imposes, whether it be negligence or strict liability, a licensee remains free to continue operating under federal standards and to pay for the injury that results. . . . Compensatory damages therefore complement the federal regulatory standards, and are an implicit part of the federal regulatory scheme." 104 S. Ct.

462, Blackman & Marshall dissent. The parallels to this case are obvious and the California Supreme Court's analysis of *Silkwood* is accurate. 7a-10a. No conflict exists.

Chicago & N.W. Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981) is clearly distinguishable as the California Supreme Court opinion explains in footnote 6. 8a. The same reasoning distinguishes *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F. 2d 380 (9th Cir. 1953). The heirs sought compensatory damages for the four wrongful deaths, not sanctions against Beech based on subsequent Travel Air flight hours.

Roshenhan v. United States, 131 F. 2d 932 (10th Cir. 1942), *cert. denied*, 318 U.S. 790 (1943) provides no contrary authority. In *Roshenhan* the aircraft had only a state airworthiness certificate and the court held: "The [Civil Aeronautics] Act does not textually recognize a state certificate with its requirements, and we cannot presume a Congressional intent to do so." *Id.* at 935. No state certificate is at issue here.

Further, no federal certificate is at issue here either. The heirs seek only compensatory damages for the four wrongful deaths. The heirs do not seek to declare any federal regulations invalid or to decertify or ground any aircraft or to enjoin any certification or to mandate any aircraft equipment. Beech's references to such cases are inappropriate. *See, Gaunce v. deVincentis*, 708 F. 2d 1290 (7th Cir. 1983) (airman's certificate at issue); *O'Donnell v. Bond*, 510 F. Supp. 925 (D.D.C. 1981) (adequacy of regulations challenged and aircraft grounding sought); *Whitney National Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411 (1965) (action to enjoin issuance of banking certificate). Even if 49 U.S.C. § 1486(a) (Dec. 31, 1958) had been effective on July 24, 1958, when Beech certified the accident aircraft, it would have posed no bar because the heirs did not

seek to void the CAA order itself. *See, Local 533, Transport Workers Union v. Eastern Air Lines, Inc.*, 544 F. Supp. 1315, 1333 (S.D.N.Y. 1982), *modified on other grounds*, 695 F. 2d 668 (2d Cir. 1982).

As for *Campos v. Puerto Rico Sun Oil Co., Inc.*, 536 F. 2d 970 (1st Cir. 1976), in that case the agency order had to be declared illegal for the plaintiff to recover damages. In contrast, here the heirs only sought to have Beech's conduct characterized as negligent per se, not illegal. The sole issue was the performance of the aircraft, not the validity of the type certificate.

The heirs' position is not novel. Other cases hold that federal regulations may supply a state standard of care. *See, e.g., Heckel v. Beech Aircraft Corp.*, 467 F. Supp. 278, 281 (W.D. Pa. 1979); *Diamond v. Grow*, 243 Cal. App. 2d 396, 399, 52 Cal. Rptr. 265 (1966). Other cases hold that the federal air safety regulations can support negligence per se instructions. *See, e.g., McGee v. Cessna Aircraft Co.*, 139 Cal. App. 3d 179, 185-7, 188 Cal. Rptr. 542 (1983); *Lightenburger v. United States*, 298 F. Supp. 813, 838, *rev'd on other grounds*, 460 F. 2d 391 (9th Cir.), *cert. denied*, 409 U.S. 983 (1969); *Rudelson v. United States*, 431 F. Supp. 1101, 1107 (C.D. Cal. 1977), *aff'd*, 602 F. 2d 1326 (9th Cir. 1979); *Todd v. United States*, 384 F. Supp. 1284, 1294 (M.D. Fla. 1975), *aff'd*, 553 F. 2d 384 (5th Cir. 1977); *Eastern Airlines, Inc. v. Union Trust Co.*, 221 F. 2d 62 (D.C. Cir. 1955), *rev'd on other grounds*, 350 U.S. 907 (1955). *Gatenby v. Altoona Aviation Corp.*, 407 F. 2d 443 (3d Cir. 1968). Admittedly, only *McGee* addresses aircraft manufacturers, but to allow negligence per se instructions only as against pilots and air traffic controllers in an age of comparative fault and crashworthiness cases would create an unfair imbalance. Allowing federal air safety regulations to support a negligence per se jury instruction in a California products liability action creates no conflict with opinions of this

Court, federal courts of appeals or state courts of last resort. Having been properly decided by the California Supreme Court the issue requires no further action by this Court.

CONCLUSION

For the reasons stated above and those stated in the opposition of the pilot's heirs respondent passengers' heirs respectfully submit that petitioner has failed to sustain its burden of establishing the "special and important reasons" for granting the writ of certiorari as required by U.S.S. CT. Rule 17.1 (1984). No question of law at issue justifies granting the writ. No conflict of law exists to resolve by granting the writ. To alleviate their financial hardship respondent passengers' heirs pray that this Court deny the unfounded petition quickly so that their judgment for compensatory damages for the wrongful deaths of their families' sole breadwinners may be enforced.

Respectfully submitted,

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ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT, JO ANN MIRO, et al. IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether, in light of this Court's holding in *Silkwood v. Kerr-McGee Corp.*, ... U.S. ....., 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984) and in light of the provisions of 49 U.S.C., Section 1506 by which Congress has expressly declared that the provisions of the Federal Aviation Act of 1958 are not intended to abridge remedies that a party may have under state law, the giving, in a state civil action in which Respondents sought compensatory damages for wrongful deaths arising out of the crash of a Travel Air airplane designed and manufactured by Petitioner Beech and in which Respondents introduced, *inter alia*, expert evidence that the design of the Travel Air violated minimum safety standards as established by regulations of the Federal Aviation Administration ("FAA"), of a negligence *per se* instruction, embodying a principle which has been an established part of the state's negligence jurisprudence for more than a century, is either violative of the Pre-emption Doctrine or in conflict with any prior decision of this Court.

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No. 84-1471

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BEECH AIRCRAFT CORPORATION,

Petitioner,

vs.

DORIS ELSWORTH, MILDRED BEST, SANDRA DUNAWAY, and JO ANN MIRO,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT, JO ANN MIRO, et al. IN OPPOSITION

OPINIONS BELOW

Petitioner Beech has omitted to indicate that under California law, by the order of transfer to the Supreme Court of the State of California, the Opinion and Decision of the California Court of Appeal, reported at 147 Cal. App. 3d 384 and 195 Cal. Rptr. 226, has become a nullity and without any force or effect, either as a judgment or as an authoritative statement of any principle of law therein discussed. (*Ponce v. Marr* (1956) 47 Cal. 2d 159, 301 P. 2d 837; *Knouse v. Nimocks* (1937) 8 Cal. 2d 482, 66 P. 2d 438.)

JURISDICTION

The jury instruction which Beech challenges related to only one of five theories of recovery asserted by Respondents against Beech. The jury returned a general verdict against Beech and in favor of Respondents and did not specify or identify the theory or theories upon which it had found Beech liable. On appeal, Beech expressly disavowed making any challenge whatever of the sufficiency of the evidence to support the findings against it on *any* theory. Under California established rules of appellate review, error in the giving of a challenged instruction is never presumed, but must be affirmatively shown by the appellant. (*Kostecky v. Henry* (1980) 113 Cal. App. 3d 362, 170 Cal. Rptr. 197.) Since Beech had failed to show how it could have been hurt by the giving of the challenged instruction, the California Supreme Court, even had it agreed with Beech that the instruction was erroneous, would have been precluded, by virtue of the provisions of California Constitution, Article VI, Section 13 from re-

versing the judgment in favor of Respondents. The judgment of the Supreme Court of California, therefore, is based upon an adequate and independent state ground. No question or claim within the purview of 28 U.S.C., Section 1257(3), has been properly raised by Petitioner Beech. The Decision of the California Supreme Court is based solely upon the application of a statutory rule affecting the burden of proof, which has been uniformly and consistently applied in civil actions tried in the courts of California. No federal question of any substance has been presented by Petitioner Beech.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

49 U.S.C., Section 1506:

Nothing contained in this chapter [the Federal Aviation Program] shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

California Evidence Code, Section 669:

(a) The failure of a person to exercise due care is presumed if:

(1) He violated a statute, ordinance, or regulation of a public entity;

(2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and

(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

(b) This presumption may be rebutted by proof that:

(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law; or

(2) The person violating the statute, ordinance, or regulation was a child and exercised the degree of care ordinarily exercised by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption may not be rebutted by such proof if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications.

STATEMENT OF THE CASE

Respondents Jo Ann Miro, Michael George Miro, Edward Andrew Miro and Jeannie Lee Miro (herein collectively referred to as Respondents, Jo Ann Miro, et al.) adopt and incorporate by this reference the Statement of the Case as set forth in the brief of Respondents Elsworth, Best and Dunaway in opposition to the Petition for a Writ of Certiorari.

REASONS FOR DENIAL OF THE WRIT[1]

I.

THE GIVING IN THIS CASE OF A NEGLIGENCE PER SE INSTRUCTION THAT WAS FULLY SUPPORTED BY THE EVIDENCE ADDUCED AT TRIAL IN NO WAY CONFLICTS WITH OR IMPINGES UPON THE FAA'S EXCLUSIVE REGULATORY JURISDICTION.

In an attempt to invest this case with constitutional stature, Beech makes the eye-catching but specious contention that the giving of the negligence *per se* instruction in this case impermissibly interferes with the FAA's "exclusive and plenary authority over the subject of aircraft certification." Although none of Beech's arguments possesses the slightest merit, Beech has gamely tried to overcome this insurmountable handicap by the substitution of rhetoric for substance, by the merciless repetition of its arguments, by the extravagant hyperbole of its claims, and, above all, by the increasing stridency of its contentions.

Wringing its corporate hands, Beech ponders what to do: should it ground its entire fleet? Beech expresses its grim foreboding that as a result of the California Supreme Court's decision "confusion and havoc . . . will be visited upon federal regulatory schemes and the industries or activities which they regulate" (Ptn., p. 21). Beech's apprehensions are groundless. Beech may

[1] In addition to the reasons hereinafter set forth, the Miro Respondents adopt and incorporate all of the contentions made, and the authorities cited, by Respondents Elsworth, Best and Dunaway in their Brief in Opposition to the Petition for Writ of Certiorari.

continue to design, build, sell and even fly its planes without hindrance of any kind. But its planes may not be *crashed* with impunity to Beech, if those crashes are caused by Beech's failure to see that the design of its aircraft conforms to minimum safety standards. In such an instance it is entirely appropriate to hold Beech accountable for any injuries caused by such shortcomings. Holding such a manufacturer to account in no way interferes with any federal regulatory scheme. To the contrary, it enhances and complements Congress' manifest concern for public safety.

It is critically important to note that this case, despite Beech's contention to the contrary, has nothing whatsoever to do with the FAA's exclusive jurisdiction to *certify* aircraft. This action is a civil wrongful death action in which the Respondents merely sought compensatory damages for the deaths of their respective decedents. Respondents did not seek, and the jury was not empowered to revoke the Travel Air's airworthiness certificate. Nor did Respondents ask the jury to invalidate or impugn the certification procedure. Respondents did not seek to challenge the jurisdiction of the FAA to establish regulations, nor did they attempt to have the jury alter, amend or revoke any of those regulations. Respondents did not ask the jury to find that Beech was a "violator" (Ptn., pp. 12, 17) or a "federal lawbreaker" (Ptn., p. 8)[2].

The jury in this case was merely asked to perform the traditional function of juries in such cases, and one

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[2] In its comment accompanying California Evidence Code, Section 669, the California Law Revision Commission cogently observes that "the ultimate question [in a case involving the application of this section] is whether the opponent of the presumption was negligent rather than whether he violated the statute . . ."

of the issues that this jury was necessarily called upon to decide was the *factual* issue of whether the design of the Beech Travel Air complied with the applicable minimum safety standards established by the FAA regulations.

The jurors in this case would doubtlessly be shocked and dismayed to learn that they were – at least as Beech views it – "reconsidering" (Ptn., pp. i, 16, 22), "redetermining" (Ptn., pp. i, 2, 8, 11, 17, 19, 22), "interfering with" (Ptn., p. 2), "policing" (Ptn., pp. 2, 14, 15, 19, 20, 21), "second-guessing" (Ptn., pp. 8, 11, 12, 15, 17, 20), "redeciding" (Ptn., p. 8), "overruling" (Ptn., pp. 11, 12, 14, 17), "re-examining" (Ptn., pp. 14, 17), and "overturning" (Ptn., p. 14) the orders, regulations and certification decisions of the FAA; that they had been "deputized" as "assistant FAA inspectors" (Ptn., p. 15) to "invade the province of the FAA" (Ptn., p. 17) and to "police" its activities (Ptn., p. 2); and that they were collectively functioning not merely as a civil jury in a wrongful death suit, but also as a "legislature" and "regulatory agency" (Ptn., pp. 2, 19).

Aside from being an exhilarating trip through the Thesaurus, Beech's characterizations of the jury's actions is nothing more than empty rhetoric and it does not bear even an arguable semblance to the realities of the situation. This Court has already expressly determined that, at least insofar as public safety is concerned, the action of a state civil jury in awarding damages does not impermissibly interfere with a federal agency's regulatory jurisdiction. (*Silkwood v. Kerr-McGee Corp.*, —— U.S. ——, 104 S. Ct. 615, 78 L. Ed. 2d 443 (1984).)

II.

IN LIGHT OF THE EVIDENCE IN THE RECORD, THE RESPONDENTS WERE CLEARLY ENTITLED TO THE NEGLIGENCE PER SE INSTRUCTION BASED ON THE PROVISIONS OF CALIFORNIA EVIDENCE CODE, SECTION 669, AND THE UNANIMOUS DECISION OF THE CALIFORNIA SUPREME COURT HOLDING THAT THE GIVING OF THAT INSTRUCTION DOES NOT VIOLATE THE PRE-EMPTION DOCTRINE IS MANIFESTLY CORRECT.

In order to bring Beech's arguments into perspective, it is necessary to examine the contentions that Beech has *not* made:

1. Beech has never challenged the sufficiency of the evidence to support the verdict against it on *any* of the theories of recovery asserted by Respondents.[3]

2. Beech has never challenged the propriety of permitting Respondents' expert witnesses to testify at trial that the design of the Travel Air violated the five Civil Air Regulations which were ultimately the subject of the negligence *per se* instruction.[4]

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[3] Respondents asserted five theories of liability against Beech: negligence and strict liability on the basis of the Travel Air's defective design; negligence and strict liability based upon the failure of the aircraft design to meet the minimum safety standards established by the FAA for single-engine stalls, single-engine climb rate and spin characteristics for this category of airplane; and negligence based on Beech's failure to adequately warn pilots of the aircraft's undue spinning tendencies during single-engine stalls.

[4] The regulations are CAR 3.85(b), 3.106, 3.120, 3.123 and 3.124.

A consideration of the necessary implications of the foregoing permits one to see Beech's contention for the incongruous thing that it is. Given the state of the record in this case, it is indisputably established that the jury could have found Beech to have been negligent in the design of the Travel Air, *and could have based that finding on the expert testimony that the design of this aircraft violated the enumerated CAR's.* Most importantly, the jury could have reached this conclusion *without* resort to the negligence *per se* instruction. Beech's contention, therefore, reduces to the following absurdity: although it was clearly permissible and proper for the jury to conclude that Beech was negligent in failing to meet the minimum safety standards in its design of the Travel Air, it was an error of constructional magnitude to *inform* the jury that they could so conclude!

Beech's argument is marked by yet a further major incongruity. Beech has expressly conceded that the jury in this case could have found Beech liable for defective design of the Travel Air even if Beech had fully complied with all applicable FAA regulations, because the jury could have determined that such compliance was insufficient to absolve Beech's duty as a manufacturer. Beech, therefore, has conceded that a civil jury is at liberty to impose *higher* standards on a manufacturer. This, apparently, would have no chilling or adverse effect upon the aviation industry and would not interfere with any federal regulatory scheme. Permitting a jury to determine whether *minimum* standards had been complied with, however, will, according to Beech, bring on the Apocalypse. Beech, understandably has never attempted to explain this patent incongruity.

III.

IN LIGHT OF THE EXPRESS SAVINGS PROVISION AND IN LIGHT OF THIS COURT'S HOLDING IN SILKWOOD, THE DECISION OF THE CALIFORNIA SUPREME COURT IS UNQUESTIONABLY CORRECT.

The position of the Respondents in this case is even stronger than the position of their counterpart in *Silkwood*: In the instant case it is not necessary for the Court to infer Congressional intent to tolerate state civil suits in areas that are subject to federal regulatory control. In 49 U.S.C., Section 1506, Congress has expressly declared that the provisions of the Federal Aviation Act of 1958 are not intended to abridge remedies that a party may have under state law. As the California Supreme Court succinctly noted, the doctrine of negligence *per se* is one of those remedies (Ptn. App., p. 8a).

Beech perforce concedes that the Respondents are free to resort to state court remedies and to seek recovery against it under "traditional principles" of negligence and strict liability in tort (Ptn., p. 16). Although this is clearly a concession of Beech's entire position on this petition for certiorari, Beech is unfazed. Beech makes the demonstrably fallacious argument that in rejecting Beech's claim of error in the giving of the negligence *per se* instruction the California Supreme Court has "created a new, separate and independent ground of civil liability" (Ptn., p. 1).

The doctrine of negligence *per se*, based upon viola-

tion of a statute or ordinance has been judicially recognized in California for over a century. (See, *Siemers v. Eisen* (1880) 54 Cal. 418.) In 1967, the negligence *per se* principle was codified as California Evidence Code, Section 669. In its comment accompanying Section 669, the California Law Revision Commission notes that that section "codifies a common law presumption that is frequently applied in California cases." (See, *Alarid v. Vanier* (1958) 50 Cal. 2d 617, 327 P. 2d 897.) The principle embodied in Section 669, therefore, is unquestionably a part of California's "traditional" negligence jurisprudence. It is an even-handed principle that is applied uniformly in civil cases. It may be used to establish a plaintiff's contributory negligence as well as a defendant's negligence. (*Nevis v. Pacific Gas & Elec. Co.* (1954) 43 Cal. 2d 626, 275 P. 2d 761.)

Since the trial evidence in this case included expert testimony that the design of the Beech Travel Air violated the applicable minimum air safety regulations, the Respondents were clearly entitled to the negligence *per se* instruction. Indeed, in light of that evidence, it would have been prejudicially erroneous for the trial court to refuse that instruction. (*Fish v. Los Angeles Dodgers Baseball Club* (1976) 56 Cal. App. 3d 620, 128 Cal. Rptr. 807.)

Beech's position – that Respondents should be conclusively bound by the *factual* determination of compliance with the CAR's, a determination that was made *years* before Respondents had suffered any injury – would clearly emasculate Respondents' state remedy since it would deprive them of any opportunity to adjudicate the fundamental and purely factual issue of

whether the design of the Travel Air complied with the federal regulations.

Beech lamely asserts that the only remedy available to a party who claims that an aircraft design does not comply with safety regulations is to bring an action to challenge certification in the federal district court pursuant to the provisions of 49 U.S.C., Section 1486(a) within sixty days of the issuance of a type certificate (Ptn., p. 24). This "remedy", however, was no remedy at all for these Respondents. It was time-barred many years before Respondents had suffered any injury (and before one of them was even born!), and it could not have provided Respondents any remedy by way of damages. The California Supreme Court correctly rejected Beech's contention that an action under Section 1486(a) was Respondents' only remedy if they wished to challenge whether the design of the Travel Air complied with applicable safety regulations.

CONCLUSION

No amount of rhetorical manipulation by Beech can transform this case into something which it decidedly is not: a case presenting a substantial federal question worthy of review by this Court. For the reasons set forth herein, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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